NO. 07-20-00312-CV

IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AMARILLO

TIMOTHY CASTLEMAN AND CASTLEMAN CONSULTING, LLC
V.
INTERNET MONEY LIMITED d/b/a THE OFFLINE ASSISTANT
AND KEVIN O'CONNOR, INDIVIDUALLY

On Appeal From
the 237th District Court of Lubbock County, Texas
Cause No. 2020-540788

APPELLANTS' BRIEF

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February 3, 2021

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INTRODUCTION

Appellants TIMOTHY CASTLEMAN and CASTLEMAN CONSULTING, LLC submit this Brief on the merits of the Order of the Honorable Les Hatch, Presiding Judge of the 237th District Court of Lubbock County, Texas, granting summary judgment for Appellees on cross-motions for summary judgment on Appellants' Bill of Review.

Appellants are referred to thus and Appellees are referred to hereinafter as "Internet Money."

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 38.1(a), Appellants certify that the following is a complete list of the parties, the attorneys, and any other person who has any interest in the outcome of this lawsuit:

Appellants:

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Appellees:

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Trial Court Judge:

The Hon. Les Hatch
Presiding Judge
The 237th District Court
Lubbock County, Texas

GLOSSARY OF RECORD REFERENCES

The following reference abbreviations are used in this Brief to designate the documents in the record, as well as other pertinent matters:

The Clerk's Record is cited by page number, and paragraph if applicable, *i.e.*, (CR at 150, ¶ 2), followed by the Tab number in the Appendix if applicable, *i.e.*, (App. at 1).

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TO THE HONORABLE SEVENTH COURT OF APPEALS:

STATEMENT OF THE CASE

Appellants filed a Petition for Equitable Bill of Review, which concerned two underlying default judgments in favor of Internet Money. (CR at 42).

Internet Money and Appellants both filed motions for summary judgment on the bill of review. (CR at 6; CR at 154). Appellants also moved for a no evidence summary judgment motion on Internet Money's affirmative defenses. (CR at 166).

The Honorable Judge Hatch, Presiding Judge of the 237th District Court of Lubbock County, Texas signed a final Amended Order granting summary judgment for Internet Money on November 30, 2020. (CR at 254, App. 1).

Appellants filed a premature Notice of Appeal on November 9, 2020, effective as of November 30, 2020, and jurisdiction of this appeal is provided for under Texas Rules of Appellate Procedure 25.1(b) and 27.1(a).

STATEMENT ON ORAL ARGUMENT

Appellants do not believe that oral argument will assist the Court in resolving the issues on appeal.

ISSUE PRESENTED

ISSUE ONE: Whether the District Court improperly granted summary judgment for Internet Money on Appellants' bill of review.

ISSUE TWO: Whether the District Court improperly denied a no evidence summary judgment for Appellants on Internet Money's affirmative defenses.

STATEMENT OF FACTS

1. In 2019, Internet Money filed a Motion requesting $57,563 in attorney's fees expended in defending against Appellants' interlocutory appeal to this Court and the Supreme Court of the denial of their Motion to Dismiss under the Texas Citizens' Participation Act. (CR at 197, App. 2). The trial court denied Internet Money's attorney's fees request on June 26, 2019. (CR at 203, App. 3).

2. Appellants' trial attorney, Jared Hall, then filed a Motion to Withdraw, which stated that there was no trial setting and that no attorney was substituted in to represent Appellants. (CR at 227, App. 4).

3. Hall did not recall informing Appellants of a trial date when he withdrew because he was not aware of any at the time, (CR at 191, ¶ 3, App. 9), and Appellants' appellate counsel did not inform them of any trial setting. (CR at 194, ¶ 2, App. 10).

4. In December of 2019, the trial court ordered a hearing set for the 20th on an Internet Money discovery motion, (CR at 205, App. 5), but Appellants did not receive an order or any other notice of the hearing and were not present at the hearing. (CR at 187, ¶ 8, App. 8). At the hearing, besides granting Internet Money's discovery motion, the trial court also signed a separate Order granting the $57,563 in attorney's fees the court had denied just six months earlier. (CR at 209, App. 6).

5. At the same hearing, Internet Money also requested a severing out of the attorney's fees award so that it would become a final judgment, (CR at 215), which the trial court set for hearing a week later (CR at 181, Seq. #119), and granted and severed out into Cause No. 2016-519,740-A and made a final judgment in January.

(CR at 211, App. 7).[1]

6. Appellants did not receive notice of the severance hearing or a Rule 306a(3) notice that the attorney's fees' Order was severed and made final. (CR at 187, ¶¶ 7, 9-11, App. 8). They were notified of the fact by their former attorney, Hall, who was still receiving electronic case notices, and at his suggestion, Appellants, acting *pro se*, timely filed a motion for re-hearing, (CR at 187-88, ¶ 11, App. 8) (CR at 181, Seq. #124) (CR at 28), which was overruled by operation of law.

7. Because Timothy Castleman is not a licensed attorney, he could not represent Castleman Consulting, LLC for any purposes. But, because a garnishment action had been filed for execution on Cause No. 2016-519740-A, Appellants began attempts to find an attorney to fight the garnishment, still unaware of any upcoming trial date. (CR at 188, ¶¶ 12-13, App. 8).

8. Appellants paid a retainer for the garnishment action to an attorney on February 28th, after which Castleman left the country from March 1st through March 18th on business, but this attorney terminated her representation on March 10th without ever making an appearance. (CR at 188, ¶ 13, App. 8) (CR at 222-25).

[1] This Court's Order granting severance indicates it was signed on "January 15, 2019," but this is clearly an error, as the Clerk's acceptance of filing is dated January 15, 2020. Further, a review of the dockets of Cause No. 2016-519740-A and Cause No. 2016-519740 shows that the order granting $57,563 in attorney's fees was only docketed in Cause No. 2016-519740, (CR at 181, Seq. #117), although clearly the order granting the attorney's fees, for which final judgment status was requested, should be included with the filing in Cause No. 2016-519740-A, but is not.

9. This case came on for trial on the merits and the trial court entered a default Final Judgment on March 2, 2020, (CR at 218, App. 11), while Castleman was out of the country. All Appellants were aware of as of that date was the attorney's fees Order they had requested to be reheard and the garnishment action. Appellants first learned of the March 2nd trial and default judgment when Castleman was contacted again that afternoon by their former attorney Hall, who was still getting electronic case notices. (CR at 188, ¶ 14, App. 8) (CR at 191, ¶ 4, App. 9).

10. Upon Castleman's return to the country, the TSA advised him to self-quarantine for 14 days, which he did, and during this time he spoke to Hall again, who told him he could not represent Appellants and that they needed to file a motion for new trial and immediately retain counsel. (CR at 188, ¶ 15, App. 8) (CR at 192, ¶ 5, App. 9). Appellants, acting *pro se*, timely filed their motion, (CR at 181, Seq. #135), and they resumed their attempts to retain counsel, (CR at 188-89, ¶¶ 15-16, App. 8). Appellants' Motion for New Trial was overruled by operation of law.

11. Appellants contacted 43 different trial or appellate attorneys around the State, all of whom, after discussing or reviewing the case, declined to represent Appellants for various reasons. Appellants finally spoke to the undersigned on July 2nd, who agreed to represent him on July 8th. (CR at 188-89, ¶¶ 16-17, App. 8).

12. Relying on the COVID Emergency Orders, Appellants filed a motion in the trial court to modify the deadlines to extend the court's plenary power and grant a new trial, in Cause No. 2016-519,740-A, (CR at 184, Seq, #21), and a similar motion and supplement in Cause No. 2016-519,740, (CR at 181, Seq. ##141, 143), both of which the trial court denied, (CR at 184, Seq. #26; CR at 182, Seq. #149).

13. The undersigned contacted the Clerk for the Seventh Court of Appeals and was told that the appellate court would likely consider a request to extend the deadline for filing appeals due to the COVID crisis only if the request had been filed within 15 days of appellate deadlines. (CR at 166, 171).

ARGUMENT

A. Standards of Review

The remedy afforded by a bill of review is equitable in nature and it is intended to prevent manifest injustice.[2] Bills of review are ordinarily reviewed for abuse of discretion, but where the trial court grants summary judgment the proper standard of review is the summary judgment standard.[3] A trial court's ruling on a

[2] *Simmons v. Slalom Shop, LLC*, 07-12-0169-CV, 2012 WL 5305791, at *1 (Tex. App.—Amarillo Oct. 29, 2012, no pet.) (citing *French v. Brown*, 424 S.W.2d 893, 895 (Tex. 1967).

[3] *Bowers v. Bowers*, 510 S.W.3d 571, 576 (Tex. App.—El Paso 2016, no pet.) (citing *Clarendon Nat'l Ins. Co. v. Thompson*, 199 S.W.3d 482, 487 (Tex. App.–Houston [1st Dist.] 2006, no pet.); *Tummel v. Roadrunner Transp. Sys., Inc.*, 13-16-00335-CV, 2018 WL 1545573, at *6 (Tex. App.—Corpus Christi Mar. 29, 2018, pet. denied)(mem. op.); *Barowski v. Gabriel*, No. 04-08-00800-CV, 2010 WL 3030874, at *2 (Tex. App.—San Antonio Aug. 4, 2010, no pet.) (mem. op).

summary judgment motion, whether traditional or no evidence, is under a *de novo* standard of review.[4]

A traditional motion for summary judgment is reviewed to determine whether the movant met its summary judgment burden by establishing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law.[5] A fact is "material" only if it affects the outcome for the suit under governing law, and a fact issue is "genuine" only if evidence is such that a reasonable jury could find the fact in favor of the non-movant.[6]

When both sides move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review both sides' summary judgment evidence, determine all questions presented, and render the judgment the trial court should have rendered. [7] When a trial court's order granting summary judgment does not specify the grounds relied upon, the reviewing court must affirm summary judgment if any of the summary judgment grounds are meritorious.[8]

A no-evidence summary judgment is reviewed to determine whether the nonmovant produced any evidence of probative force to raise a fact issue on the

[4] *Rocha v. Potter County*, 419 S.W.3d 371, 376 (Tex. App.—Amarillo 2010, no pet.).
[5] Tex. R. Civ. P. 166a(c); *Rocha,* 419 S.W.3d at 377.
[6] *Rayon v. Energy Specialties, Inc.*, 121 S.W.3d 7, 11-12 (Tex. App.—Fort Worth 2002, no pet.).
[7] *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).
[8] *Id*.

element challenged by the movant.[9]

B. ISSUE ONE: The trial court improperly granted summary judgment for Internet Money on Appellants' bill of review.

Because Appellants were petitioners for a bill of review claiming a no-notice due process violation, this is a "special case" where they are only required to prove one element—a lack of fault or negligence on their part.[10] Given the constitutional issue at stake, Appellants' lack of fault or negligence for not having notice is conclusively established if they offer uncontroverted proof they never received notice of the dispositive hearing or the trial setting at which default judgments were rendered.[11]

To prove lack of fault or negligence after entry of a default judgment without notice of the dispositive hearing or trial, but with notice of the judgment, a party requesting a bill of review must further show that it did not ignore, but diligently pursued all adequate legal remedies or show good cause for failing to exhaust those remedies.[12] In other words, this conditional element recognizes there

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[9] *Bryan v. Sherick*, 279 S.W.3d 731, 732 (Tex. App.—Amarillo 2007, no pet.).
[10] *See Mabon Ltd. v. Afri-Carib Enterprises, Inc.*, 369 S.W.3d 809, 812-13 (Tex. 2012).
[11] *See id*. at 812-13 (lack of notice case).
[12] Contrary to Internet Money's summary judgment argument contending there is no basis for applying a "good cause" standard to a party's failure to diligently pursue adequate available legal remedies that is precisely the standard that has been applied by this Court and other appellate courts and the Supreme Court in Texas. *See, e.g.*, *Simmons v. Slalom Shop, LLC*, 07-12-0169-CV, 2012 WL 5305791, at *1 (Tex. App.—Amarillo Oct. 29, 2012, no pet.) (setting out standard that a bill of review is not available where petitioner "failed to exercise due diligence in pursuing

can be special circumstances that amount to good cause.[13]

1. The evidence is undisputed and conclusively proves that, or at least creates a fact issue whether, Appellants did not receive notice of the hearing or trial at which default judgments were issued against them.

The material facts conclusively establish the sole element of Appellants' lack of fault or negligence for their failure to appear at either the December 20th or the December 26th hearing in 2019 or at their trial on March 2, 2020.

a. Appellants' failure to appear at the December 2019 hearings was not due to their fault or negligence because the evidence conclusively establishes they did not receive notice of either hearing.

In the lawsuit underlying the bill of review, Cause No. 2016-519,740, Internet Money filed a motion requesting $57,563 in attorney's fees expended in defending against Appellants' interlocutory appeal of the trial court's denial of their Motion to Dismiss pursuant to the Texas Citizens' Participation Act. (CR at

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all adequate legal remedies to the challenged judgment or to show good cause for failing to exhaust those remedies…") (emphasis added) (citing and quoting *Ferrice v. Legacy Ins. Agency, Inc.*, No. 02–05–0363–CV, 2006 WL 1714535 (Tex. App.—Fort Worth June 22, 2006, pet. denied) (mem. op.); *French v. Brown,* 424 S.W.2d 893, 895 (Tex. 1967) (holding that there was "insufficient cause" for relief by bill of review where petitioners failed to invoke right to appeal and "no reason [was] advanced in his petition for bill of review for the fact that he did not seek…the appeal remedy" and "no showing of diligence.") (emphasis added); *Walker v. Walker*, 05-13-00481-CV, 2014 WL 4294967, at *1 (Tex. App.—Dallas Aug. 21, 2014, no pet.) ("A bill of review plaintiff claiming lack of notice of a trial setting is relieved of proving the first two elements, but still must prove the third element required in a bill of review proceeding: lack of fault or negligence. This element requires a party to show that it diligently pursued all adequate legal remedies or show good cause for failing to exhaust those remedies.") (emphasis added).

[13] *See Caldwell v. Barnes*, 154 S.W.3d 93, 97, n.2 (Tex. 2004) ("failure to seek reinstatement, new trial, or appeal, if available, normally would be negligence) (emphasis added).

197, App. 2). The trial court denied the attorney's fee request by Order dated June 26, 2019. (CR at 203, App. 3).

A few months later, Appellants' attorney withdrew, (CR at 227, App. 4), and nearly three months later, Internet Money filed a motion to compel discovery responses, which the trial court set for hearing on December 20, 2019. (CR at 205, App. 5). At that hearing, besides granting Internet Money's motion to compel, the trial court also signed a separate Order granting Internet Money the $57,563 in attorney's fees the court had previously denied just six months earlier. (CR at 209, App. 6). At the same hearing, Internet Money also filed a motion requesting a severance so that the attorney's fees Order could be made into a final judgment. (CR at 215). This motion was set for hearing by submission a week later, on December 27th, (CR at 181, Seq. #119), and it was made into a final dispositive judgment by the trial court's severance Order on January 15, 2020. (CR at 211, App. 7).

Appellants testified they did not receive any notice of either the December 20th or the December 27th hearings or any Rule 306a(3) notice that the attorney's fees Order was severed out and made final, (CR at 187, ¶¶ 7-10, App. 8), and there is no evidence in the record to dispute this. There is no evidence that any notice of either hearing was mailed to Appellants' address, although this address was listed

in their attorney's withdrawal motion. (CR at 227, ¶ 6, App. 4). Regardless, however, of whether Appellants received any notice of a hearing on December 20th, the facts prove it is impossible that Appellants had notice that the hearing would take up Internet Money's request for $57,563 in attorney's fees. The undeniable fact is that the trial court's Order setting hearing only noticed a hearing on one motion—Internet Money's motion to compel. (CR at 205). Furthermore, the record does not show that, prior to the hearing, Internet Money re-urged their previously denied motion for attorney's fees or filed any new motion for attorney's fees.[14]

Appellants "right to notice" of the hearing on December 20th and that the attorney's fees request would be considered or re-considered "is a matter of constitutional due process,"[15] because the Order issued that day was converted into a final "dispositive order," *i.e.*, a default judgment, by virtue of the trial court's severance Order on January 15, 2020. And because Internet Money's motion for severance to make the attorney's fees Order into a "final" order was set for hearing on December 27th, Appellants had a constitutional right to prior notice of that hearing as well.

[14] What the record shows is that Internet Money's attorney orally moved for those fees again, and the Court granted the motion without taking any notice of the prior denial. (CR at 236).
[15] *See LBL Oil Co. v. Int'l Power Servs., Inc.*, 777 S.W.2d 390, 390-91 (Tex. 1989).

Furthermore, a default judgment hearing is a "trial setting" because it is dispositive of a case,[16] so Appellants were entitled to a mandatory 45 days' notice of the December 20th hearing or, at least, of the December 27th hearing on Internet Money's severance motion requesting the December 20th Order be made into a final and appealable order.[17] And yet, there is no evidence that the trial court, the clerk, or opposing counsel gave Appellants any notice, much less the requisite 45 days' notice, of the December 20th or the December 26th hearing, which converted the December 20th hearing, after the fact, into a dispositive hearing by virtue of the January 15th Order severing out the attorney's fee award into Cause No. 2016-519,740-A.

Failure to give the required notice made the severed-out post-answer "default judgment" on the attorney's fees Order invalid.[18] And, there is no authority that would permit dispensing with constitutional due process requirements by retroactively converting a non-dispositive order, such as for an interim award of attorney's fees, into a dispositive order by a subsequent severance order. Given Appellants' testimony they did not receive notice and the lack of any

[16] *Id*.
[17] Tex. R. Civ. P. 245.
[18] *In re Marriage of Shoemaker*, 07-04-0422-CV, 2005 WL 1083224, at *1 (Tex. App.—Amarillo May 9, 2005, no pet.) ("A post-answer default judgment will be valid only if the defaulting party received prior notice of the dispositive hearing at which the judgment was rendered.").

summary judgment evidence to dispute this, their statutory and constitutional rights were clearly violated through no fault or negligence of their own, and no genuine issue of material fact exists on this point.

b. Appellants' failure to appear at the March 2, 2020 trial was not due to their fault or negligence because the evidence conclusively establishes they did not receive notice of the trial.

The evidence conclusively establishes that Appellants did not receive any notice of the trial setting, either from their attorneys prior to or subsequent to their withdrawal or otherwise.

1). Appellants' affidavit that they did not receive prior notice of the trial date is uncontroverted.

This case came on for trial on the merits, without the Appellants' presence, and the trial court entered a default Final Judgment on March 2, 2020, (CR at 218, App. 11). There is no evidence in the summary judgment record that creates a dispute regarding the evidence showing no notice of trial. To begin with, there is no evidence that disputes the testimony of Appellants' trial attorney, Jared Hall, that he does not recall providing any notice of a trial date to Appellants, (CR at 191, ¶ 3, App. 9), or the testimony of their appellate attorney, Leif Olson, that he

never provided Appellants with notice of the trial date, (CR at 194, ¶ 2, App. 10).[19] To the contrary, Hall's Motion to Withdraw specifically states that "[t]he case is not currently set for trial" and that a copy of the Motion to Withdraw was provided to Appellants.[20] (CR at 227, ¶¶ 4, 6, App. 4). Furthermore, there is no evidence that the Order granting Hall's withdrawal containing the notice of the trial date was ever served on Appellants by mail or otherwise.[21] Although Hall's motion to withdraw provided Appellants' last-known address, (CR at 227, ¶ 6, App. 4), which was correct, (CR at 30), there is no evidence of service or delivery of any document on or other communication to or with Appellants, after Hall and Olson

[19] In its summary judgment motion, Internet Money attempted to rely for proof of notice on the statement of Appellants' former trial attorney, Jared Hall, that "at the time of his withdrawal," he did not recall informing Appellants of any upcoming deadlines or settings, and also on the fact that Appellants' former appellate attorney, Leif Olson, requested and was sent a copy of the Court's scheduling order by Internet Money's attorney's legal assistant. Regardless neither Mr. Hall's uncertainty whether he informed Appellants of any trial date nor Mr. Olson's "thank you" acknowledging receipt of the scheduling order, without more, is sufficient to overcome the direct and unequivocal testimony of Appellants that neither of these former attorneys ever notified them of the trial date. Even if this evidence could somehow create a presumption of notice, the presumption disappears in light of Appellants' testimony of no notice, as is shown below.

[20] So, as far as Appellants were aware from their receipt of their trial attorney's Motion to Withdraw, there was at that time no scheduled trial date. If he was aware of a trial date and did not disclose it, this was a violation of Texas Rule of Civil Procedure 10. Regardless, the Motion to Withdraw provided Appellants with no notice of trial.

[21] In moving for summary judgment, Internet Money argued that Appellants' Motion for Rehearing after the attorney's fee default judgment, which stated that "Defendants' attorney of record, Jared B. Hall has withdrawn by order signed by this court," (CR at 28), is somehow proof that Appellants received a copy of the Order itself or were otherwise aware of its notice of the trial date. But this statement alone, without more, shows neither receipt of the Order nor awareness of anything other than that an order permitted Hall to withdraw had been signed; it certainly provides no proof Appellants were otherwise aware of any other information communicated by the Order, much less that they were aware of the trial date contained in the order.

had withdrawn, that contained a trial date or suggested prior awareness of a trial date that would permit a presumption that Appellants' were provided with notice of or were otherwise aware of the trial date.[22]

Further, although Appellants were able to retain the services of an attorney on the Friday before the Monday, March 2nd trial date, the evidence establishes that they retained her for the specific purpose at the time to represent them in arguing the garnishment on their bank accounts as a result of the January 15, 2020 Order of this Court, having no knowledge at the time of any upcoming trial. (CR at 188, ¶¶ 12-13, App. 8). There is no evidence this attorney was or became aware of the trial setting prior to March 2nd, and the evidence that exists indicates that she was not aware. (CR 222-25). But in any event, Appellants did not learn of the trial date from her. Rather, their first awareness of the trial was after the fact on the afternoon of March 2nd, when Hall, their former attorney (who was still receiving electronic notices in the case), contacted them to ask whether they were aware that a Final Judgment had been entered against them earlier that day. (CR at 188, ¶ 15, App. 8).

[22] In their summary judgment motion, Internet Money referred to pre-trial email communications between Appellants and Internet Money in December of 2019 and January of 2020, but none of these emails suggests awareness of, much less mentions, the trial date. (CR at 32-38). The one that does mention the trial was clearly sent later in the day after the trial, (CR at 39), and the evidence shows that Appellants were notified after the trial that day by their former attorney (CR at 188, ¶ 14, App. 8).

The evidence in this case should be viewed the same way the evidence was treated recently by this Court in *MM&J Investments, LLC v. KTH Investments, LLC*, where a default judgment had been entered against the appellants, who did not appear for trial.[23] Although *MM&J* involved appeal of a denial of a motion for new trial rather than a bill of review for a new trial, the dispositive issue was the same—must a new trial be granted where the defendant attests to no receipt of notice of the trial setting?[24] In that case, the appellants' attorney had also withdrawn, but there the parties had stipulated that the court had mailed a notice of the trial setting to the appellants' last known address, creating a presumption of receipt. Nevertheless, because the evidence of mailing alone did not controvert the appellants' affidavit and testimony that they did not ever receive the notice, the presumption "vanished."[25] The result, this Court concluded, was that "the evidence establishes that appellants did not receive notice of the trial setting and, as such, the trial court abused its discretion by denying appellants' motion for a new trial."[26]

Here, there is no such stipulation, much less any other evidence that a notice of the trial setting was ever mailed or otherwise served on Appellants to even

[23] *MM&J Investments, LLC v. KTH Investments, LLC*, 602 S.W.3d 687 (Tex. App.—Amarillo 2020, no pet.) (App. 12).
[24] *Id*. at 689-90.
[25] *Id*. at 690-91.
[26] *Id*. at 691 (reversing and remanding for a new trial).

create a presumption to overcome. So, even under the stricter *de novo* standard rather than the abuse of discretion standard applied in *MM&J*, without any affirmative evidence of receipt (despite Internet Money's attempts to conjure some out of mere suppositions), Appellants' affidavit is uncontroverted. There is no genuine issue of material fact on this point either.

2). Internet Money's "imputed knowledge of the trial date" argument does not apply to the facts of this case.

In its motion for summary judgment, Internet Money attempted to get around its glaring and absolute lack of competent, controverting evidence of notice by arguing imputed knowledge of the trial date as the basis for binding Appellants by the acts or omissions of their former attorneys Hall and Olson. Even assuming either was actually aware of or had constructive notice of the trial date when he withdrew, which the evidence does not establish, the very case to which Internet Money cited in their motion for support, *Saint v. Bledsoe*, makes it clear that the act of an attorney binds the client as a general rule only "as long as the attorney-client relationship endures, with its corresponding legal effect of principal and agent."[27] Internet Money's citation to and attempt to distinguish *Mabon Ltd. v.*

[27] *Saint v. Bledsoe*, 416 S.W.3d 98, 108 (Tex. App.—Texarkana 2013, no pet.); *see also* cited case *Dow Chem. Co. v. Benton*, 163 Tex. 477, 482 (1962) (same); *see also Langdale v. Villamil*, 813 S.W.2d 187, 190 (Tex. App.—Houston [14th Dist.] 1991, no writ) ("The attorney-client relationship is one of agent and principal. Where the agent abandons his office before conclusion of the proceedings, any knowledge possessed by the agent cannot be imputed to the principal.");

Afri-Carib Enterprises, Inc. on the basis that in that case the bill of review petitioner's attorney was suspended fares no better. As recognized in *Bledsoe*, "In *Mabon Ltd.* the Texas Supreme Court did not impute the negligence of counsel to Mabon. The apparent explanation of that is that notice given to an attorney who is suspended or disbarred is not imputed to his or her client."[28]

If notice to a suspended attorney is not imputed to the client otherwise without notice, there is no legal rationale for doing so where the attorney-client relationship no longer exists after withdrawal, as other cases make abundantly clear. For instance, in *Tactical Air Defense Services, Inc. v. Searock*, the Dallas appellate court rejected an argument similar to Internet Money's—that an attorney's awareness of a trial date before he withdrew should be imputed to his clients after withdrawal where he did not provide them with the required notice of the trial date.[29] In *Searock*, the defendants' attorney received notice at a status conference of a trial date some ten months in the future. Shortly after the

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J.T.B., Inc. v. Guerrero, 975 S.W.2d 737, 739 (Tex. App.—Corpus Christi 1998, pet. denied) ("[N]otice acquired by an attorney in the absence of the attorney-client relationship will not be imputed to the former…client); *Leon's Fine Foods of Tex., Inc. v. Merit Inv. Partners, L.P.*, 160 S.W.3d 148, 154-55 (Tex. App.—Eastland 2005, no pet.) (notice to an attorney of a trial date could not be imputed as constructive notice to his former client with no actual notice); *Valdez v. Robertson*, 352 S.W.3d 832, 835 (Tex. App.—San Antonio 2011, no pet.) (client did not have constructive notice of motion served on his suspended attorney).

[28] *Bledsoe*, 416 S.W.3d at 108.

[29] *Tactical Air Defense Services, Inc. v. Searock*, 398 S.W.3d 341 (Tex. App.—Dallas 2013, no pet.) (App. 13).

conference, he withdrew, and although he sent notice of the trial date to his clients, he did not comply with the rules for sending the notice, and the clients testified they never received the notice.[30] Under these circumstances, the appellate court in *Searock* stated, "[C]onsidering the importance of preserving the client's right to due process when an attorney withdraws, we conclude that [the withdrawn attorney's] knowledge of the trial setting cannot be imputed to his clients."[31]

Although Appellants in this case do not dispute that they received Hall's motion to withdraw, that is a distinction without a difference. The issue of whether an attorney's knowledge of a trial date will be imputed to his clients after he has withdrawn turns on whether he failed to properly provide them with notice of the trial date before or at the time of his withdrawal, and Hall's withdrawal motion provided no such notice. As in circumstances where an attorney has been suspended, the applicable rule of law is no different for withdrawal: "Where the agent abandons his office before conclusion of the proceedings, any knowledge possessed by the agent cannot be imputed to the principal."[32]

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[30] *Id*. at 343.

[31] *Id*. at 347. *See also Walton v. Walton*, No. 11-15-00298-CV, 2018 WL 386422, at *5 (Tex. App.—Eastland Jan. 11, 2018, no pet.) (not reported) (concluding that the record precluded a finding of imputed notice of the trial setting where the attorney's motion to withdraw "did not list the trial setting as required by the rule.").

[32] *Searock*, 398 S.W.3d at 346; *Walton*, 2018 WL 386422 at *5 (same).

2. The evidence is undisputed and conclusively proves that, or at least creates a fact issue whether, Appellants were not negligent in pursuing adequate legal remedies and had good cause for any failure to exhaust those remedies.

Because Appellants do not dispute that they were made aware of the default judgments after the dispositive hearing on attorney's fees and severance and after the trial, lack of fault or negligence also requires proof that they did not ignore, but diligently pursued all their adequate legal remedies or have shown good cause for failing to exhaust those remedies.

The record establishes that Appellants received notice of the severance Order making the attorney's fees Order into a final judgment when they were notified by their former attorney, at which time, at the suggestion of their former attorney, they filed a Motion for Re-hearing on January 17, 2020, just two days after the Order was issued, thereby timely availing themselves of this legal remedy. (CR at 187-88, ¶ 11, App. 8) (CR at 28) (CR at 181, Seq. #124). Although Appellants were able to hire a new attorney in late February of 2020 to assist them with the garnishment action that Internet Money had filed pursuant to the attorney's fee default judgment, that attorney withdrew on March 10, 2020. (CR at 188, ¶ 13, App. 8).

From March 1st to the 18th, Appellant Timothy Castleman was absent from the country, and while overseas, he was notified of the trial judgment again, by his

former trial attorney.[33] (CR at 188, ¶ 15, App. 8). Because the attorney they had hired in late February had withdrawn, Appellants again had to file a *pro-se* Motion for New Trial on that judgment.[34] (CR at 188, ¶ 15, App. 8) (CR at 181, Seq. #135). Upon his return from Spain, after self-quarantining for 14 days as advised by the TSA, Appellant Timothy Castleman attempted to retain counsel to obtain new trials on both default judgments. (CR at 188, ¶ 15, App. 8). Despite the difficulties posed by the COVID crisis, Appellants ultimately contacted 43 attorneys around the State, all of whom immediately or after discussing or reviewing the case declined to represent Appellants, either because of distance, because the case was too far along for them to get involved, until Appellants finally contacted the undersigned, who agreed to represent them on July 8, 2020. (CR at 188-89, ¶¶ 16-17, App. 8).

Appellants then made efforts, through the undersigned, to get a modification of the deadlines to extend the trial court's plenary power to grant a new trial in both underlying causes of action, pursuant to the Supreme Court's COVID Emergency Orders, (CR at 184, Seq. #21; CR at 182, Seq. #145), which the trial court declined to use its discretion to do. (CR at 184, Seq. #26; CR at 182, Seq.

[33] Appellants did receive the mailed notice pursuant to Rule 306a(3) of the Final Judgment, but their initial notice came from their former attorney while overseas.

[34] Although Appellants did not request a hearing to obtain a ruling on their motion for new trial, they were under no obligation to do so before it became final. *See Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 928 (Tex. 1999).

#149). Finally, the undersigned contacted the clerk for this Court and was told that the Court would likely consider a request to extend the deadline for filing appeals due to the COVID crisis only if the request had been filed within 15 days of appellate deadlines. (CR at 166, 171).

There was nothing Castleman Consulting, LLC could do to argue or present evidence for a new trial or to prosecute an appeal of either underlying judgment before July 8, 2020, because Timothy Castleman is not an attorney, (CR at 188, ¶ 13, App. 8), and Appellants did not have an attorney to represent them for purposes of either those motions or on appeal when the appeal deadline ran.[35] Appellants only remaining available legal remedy was to file their bill of review.

Clearly, the facts in this case are far different from the situation where a party is not entitled to a bill of review relief because it was aware of available remedies and simply ignored them, decided not to pursue them, or lacked diligence in pursuing them.[36] Simply stated, there is no evidence of fault or negligence, nor

[35] *Kunstoplast of America, Inc. v. Formosa Plastics Corp., USA*, 937 S.W.2d 455 (Tex. 1996) (per curiam) ("Generally a corporation may be represented only by a licensed attorney").

[36] *See, e.g., In Interest of Child*, 492 S.W.3d 763, 769 (Tex. App.—Fort Worth 2016, pet. denied) ("Awareness of a legal remedy and a decision not to pursue it precludes subsequent equitable relief through a bill of review.") (emphasis added); *Moseley v. Omega OB-GYN Associates Of S. Arlington*, 2-06-291-CV, 2008 WL 2510638, at *2 (Tex. App.—Fort Worth June 19, 2008, pet. denied) ("Relief by equitable bill of review is unavailable if legal remedies were available but ignored…We conclude that [petitioner] was not entitled to relief by bill of review because she failed to exercise due diligence in pursuing available legal remedies following the dismissal.") (emphasis added).

is there of a lack of good cause. Rather, despite diligent efforts under unprecedented circumstances, including attempts to persuade the trial court to extend deadlines pursuant to the Supreme Court's Emergency Orders, Appellants were unable to avail themselves of their remedies in time to argue for a new trial before the normal deadlines ran, or to pursue an appeal once their motions for new trials were denied. There is nothing in the record to dispute the facts regarding the difficultly Appellants experienced in their attempts to retain counsel, due to COVID and retained attorneys withdrawing and other attorneys declining representation until July of this year.

3. Traditional summary judgment conclusion regarding bill of review action

There are no meritorious grounds on which the trial court's summary judgment may be affirmed, and there is a manifest injustice in that judgment that should be corrected. Appellants have shown that they were not at fault or negligent, because they did not receive notice of the hearings and trial that resulted in entry of default judgments. Furthermore, they have shown that they diligently pursued their legal remedies by filing motions for new trials, and there is good cause for why they were unable to do more, including maintain an appeal, due to the COVID emergency and lack of counsel.

There is no genuine issue of material fact on the sole element of lack of fault

or negligence, and Appellants are entitled to judgment as a matter of law on their bill of review. Even assuming, *arguendo,* that Appellants have not conclusively established good cause, this does not support affirmance of summary judgment for Internet Money against Appellants. Rather, the facts raise a question regarding negligence or fault that should be resolved by a jury.[37]

The erroneous violations of Appellants' fundamental constitutional and statutory due process rights and of sound jurisprudence, and the erroneous entry of a default judgments against them, can and should be corrected. This Court may do so by entry of the order the trial court should have issued rendering summary judgment for Appellants on their Petition for Bill of Review. Alternatively, Appellants request the Court to enter an order setting aside the summary judgment and remanding this case for trial to determine the issue of good cause and, if such is found by the jury, to determine the merits of Internet Money's cause of action.

C. ISSUE TWO: The trial court improperly denied a no evidence summary judgment for Appellants on Internet Money's affirmative defenses.

Internet Money only moved for summary judgment motion on Appellants' bill of review action. It did not do so on its affirmative defenses, although

[37] *See, e.g., Caldwell v. Barnes*, 154 S.W.3d 93, 97 (Tex. 2004) (non-service bill of review case) (where bill of review material facts are disputed, question of lack of fault or negligence in allowing a default judgment to be rendered is to be resolved at trial and not by the trial court).

Appellants did move for a no evidence summary judgment on those defenses. In the alternative, then, should this Court determine that summary judgment for Internet Money was improperly granted because fact issues remain to be determined at trial, Appellants request the Court to render judgment in part in Appellants' favor on Internet Money's affirmative defenses.

1. Appellants are entitled to summary judgment on Internet Money's facially invalid affirmative defenses of sole proximate cause, failure to comply with scheduling order, imputed knowledge, and failure to plead and prove necessary elements.

A movant is entitled to summary judgment where the non-movants' pleadings affirmatively show that it has no viable claim or defense based on the non-movants' pleadings.[38] "Affirmative defenses are claims interposed to defeat a *prima facie* case established by a plaintiff."[39] An affirmative defense does not rebut the factual propositions and claims of a plaintiff, but instead establishes an "independent reason for denying the plaintiff any recovery" on his claims.[40]

Sole proximate cause is an inferential rebuttal, not an affirmative defense.[41] As for failure to comply with scheduling order, imputed knowledge through an

[38] *See, e.g., Helena Labs. v. Snyder*, 886 S.W.2d 767, 768-69 (Tex. 1994) (affirming summary judgment for defendants where plaintiffs' pleadings raised no existing, independent cause of action); *Peek v. Equipment Serv.*, 779 S.W.2d 802, 805 (Tex. 1989) (summary judgment proper without giving opportunity to amend pleadings if pleadings affirmatively demonstrate no cause of action exists).
[39] *Walzier v. Newton*, 27 S.W.3d 561, 563 (Tex. App.—Amarillo 2000, no pet.).
[40] *Id.*
[41] *Id.* at 563-64.

attorney, and failure to plead and prove necessary elements, none of these, though asserted as affirmative defenses, are facially valid or viable defenses. None are listed as affirmative defenses in Texas Rule of Civil Procedure 94, and clearly they all are nothing more than rebuttals to the facts necessary to establish the sole element of Appellants' bill of review cause of action.

Appellants therefore request this Court to render summary judgment for them on these four facially invalid affirmative defenses, because Internet Money did not and could put forward any evidence in support of them that would establish an independent reason for denying Appellants their requested relief.

2. Appellants are entitled to summary judgment on Internet Money's affirmative defense of estoppel.

Internet Money asserted that Appellants are estopped from asserting a due process violation for lack of notice because they received service of process. It is not clear what form of the estoppel defense they assert. The affirmative defense of estoppel by record or judicial estoppel requires proof that a party has taken a position at variance with one it took under oath in a previous judicial proceeding in order to gain an unfair advantage,[42] while estoppel by deed or by contract requires proof that a party is denying the truth of a matter or terms set forth in a deed or

[42] *See Ferguson v. Building Materials Corp.*, 295 S.W.3d 642, 643 (Tex. 2009).

contract[43] Equitable estoppel requires proof of a false representation or concealing of a material fact.[44] Internet Money did not allege, much less put forward any summary judgment evidence, to support the essential elements of any of these estoppel defenses.

Moreover, the mere fact that Appellants received service of process is not an affirmative defense; it provides no independent ground for denying Appellants their requested relief, which is based on lack of notice of a dispositive hearing or trial.[45] Accordingly, Appellants are entitled to summary judgment as a matter of law, and they request this Court to render such judgment for them on any estoppel defense.

3. Appellants are entitled to summary judgment on Internet Money's affirmative defense of unclean hands.

The party claiming unclean hands has the burden to show a serious injury due to the other party's unlawful or inequitable conduct that cannot be corrected

[43] *See Green v. White*, 153 S.W.2d 575, 583 (Tex. 1941) and *Matthews v. Sun Oil Co.*, 411 S.W.2d 561, 564 (Tex. App.—Amarillo 1996) *aff'd* 425 S.W.2d 330 (Tex. 1968).
[44] *See Shields L.P. v. Bradberry*, 526 S.W.3d 471, 486 (Tex. 2017).
[45] *See Mabon Ltd. v. Afri-Carib Enterprises, Inc.*, 369 S.W.3d 809, 813 (Tex. 2012) ("Entry of a post-answer default judgment against a defendant who did not receive notice of the trial setting or dispositive hearing constitutes a denial of due process under the Fourteenth Amendment of the United States Constitution.").

without application of the doctrine of unclean hands.[46] Internet Money's mere assertion that Appellants' conduct in frustrating the power of the trial court is inequitable behavior that bars any claim for relief is nothing more than a conclusory statement. Internet Money alleged no facts and put forward no summary judgment evidence to show either a serious injury or any inequitable conduct by Appellants that would serve as an independent ground to deny Appellants the equitable relief they seek. Accordingly, Appellants are entitled to summary judgment as a matter of law, and they request this Court to render such judgment for them on Internet Money's affirmative defense of unclean hands.

4. Appellants are entitled to summary judgment on Internet Money's affirmative defense of res judicata.

Internet Money claimed that *res judicata* barred Appellants' bill of review action because the issues pleaded therein are the same issues raised by Appellants' Motions to Modify Deadlines in the underlying causes of action, Cause No. 2016-519740 and No. 2016-519740-A, which the trial court denied on August 5, 2020.

For *res judicata* to apply, the following elements must be present: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) the same parties or those in privity with them; and (3) a second action based on the same

[46] *Paciwest, Inc. v. Warner Alan Properties, LLC*, 266 S.W.3d 559, 571 (Tex. App.—Fort Worth 2008, pet. denied); *Cantu v. Guerra & Moore, LLP*, 448 S.W.3d 485, 496 (Tex. App.—San Antonio 2014, pet. denied).

claims as were raised or could have been raised in the first action.[47] Internet Money presented no summary judgment evidence to support the first element, and the trial court's orders in those two causes conclusively proves the opposite—the orders show that the trial court was not rendering a judgment on the merits of whether Appellants were entitled to a new trial due to lack of notice but only that the court was of the opinion that it did not have plenary power to modify any deadlines to consider that issue and was declining to do so pursuant to the Supreme Court's Emergency Orders. Accordingly, Appellants are entitled to summary judgment as a matter of law, and they request this Court to render such judgment for them on Internet Money's affirmative defense of *res judicata*.

CONCLUSION AND PRAYER
RELIEF REQUESTED

For the reasons set out above, Appellants request this Court to reverse the trial court's Order granting summary judgment for Internet Money and grant summary judgment for Appellants on their bill of review and on Internet Money's affirmative defenses, and remand this matter for a new trial on the merits of Internet Money's cause of action.

Alternatively, Appellants request the Court to set aside the trial court's summary judgment and remand this case for a new trial to determine the issue of

[47] *Igal v. Brightstar Information Technology Group, Inc.*, 250 S.W.3d 78, 86 (Tex. 2008).

good cause and, if such is found by the jury, to determine the merits of Internet Money's cause of action.

Respectfully submitted,

/s/ Mark W. McBrayer

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TEX. R. APP. P. 9.4(i) CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2)(B), this brief contains 7,464 words, as determined by the computer's software word-count function, excluding the portions of the brief exempted by Rule 9.4(i)(l).

/s/ Mark W. McBrayer

Mark W. McBrayer

CERTIFICATE OF SERVICE

I certify that on February 3, 2020, I served a copy of this Appeal Brief on the parties listed below by electronic service and that the electronic transmission was reported as complete.

By E-service and E-mail to:
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/s/ Mark W. McBrayer

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INDEX TO APPENDIX

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13	*Tactical Air Defense Services, Inc. v. Searock*

Filed 11/30/2020 11:26 AM
Barbara Sucsy
District Clerk
Lubbock County, Texas

CAUSE NO. 2020-540788 cf

TIMOTHY CASTLEMAN and CASTLEMAN CONSULTING, LLC, Petitioners/Defendants,	§	IN THE 237TH DISTRICT COURT
v.	§	OF
INTERNET MONEY LIMITED, d/b/a THE OFFLINE ASSIST and KEVIN O'CONNOR, INDIVIDUALLY, Respondents/Plaintiffs.	§	LUBBOCK COUNTY, TEXAS

AMENDED ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

On October 14, 2020, the Court considered the Respondents' Motion for Summary Judgment and request for a hearing by submission on same, and determined the same were in proper form. The Court, after reviewing the pleadings, motions, exhibits and responses on file, is of the opinion that there is no genuine issue as to any material fact and that the Motion for Summary Judgment should be granted.

IT IS, THEREFORE, ORDERED that the Respondents' Motion for Summary Judgment is **GRANTED.**

As such, all pending relief by Petitioners is hereby DENIED. This summary judgment finally disposes of all parties and claims in this cause of action and is appealable. All costs are taxed to Petitioners and all writs issue forth from this final judgment.

SO ORDERED.

SIGNED this 30th day of November, 2020.

JUDGE PRESIDING

CAUSE NO. 2016-519,740

INTERNET MONEY LIMITED d/b/a THE OFFLINE ASSISTANT AND KEVIN O'CONNOR, INDIVIDUALLY, Plaintiffs,	§	IN THE 237TH DISTRICT COURT
V.	§	OF
TIMOTHY CASTLEMAN AND CASTLEMAN CONSULTING, LLC, Defendants.	§	LUBBOCK COUNTY, TEXAS

PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEY FEES

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COME Plaintiffs, INTERNET MONEY LIMITED D/B/A THE OFFLINE ASSISTANT AND KEVIN O'CONNOR, INDIVIDUALLY, (hereinafter "Plaintiffs") and file this their motion for an

1. On August 10, 2016, this Court denied TIMOTHY CASTLEMAN AND CASTLEMAN CONSULTING, LLC's f(hereinafter "Defendants") Motion to Dismiss.
2. On August 22, 2016, Defendants filed a notice of appeal to the 7th Judicial Court of Appeals, Amarillo.
3. On April 19, 2017, the Amarillo Court of Appeals affirmed the Trial Court on a single basis without addressing the merits.
4. On June 5, 2017, Defendants moved for an extension to file a petition for review.
5. On June 23, 2017, Defendants filed second motion for extension of time to file petition for review in the Texas Supreme Court.
6. On November 20, 2017, Defendants filed a motion for extension of time to file brief.
7. On December 18, 2017, Defendants filed a motion for extension of time to file brief.

8. On April 27, 2018, the Texas Supreme Court reversed and remanded to the Amarillo Court of Appeals.

9. On October 18, 2018, the Amarillo Court of Appeals affirmed the Trial Court's ruling on the merits.

10. On December 19, 2018, Defendants filed a motion for extension of time to file petition for review.

11. On December 19, 2018, Defendants filed a motion for relief from technical failure.

12. On December 27, 2018, Defendants filed a second petition for review with the Texas Supreme Court.

13. On February 1, 2019, the Texas Supreme Court denied Defendants second petition for review.

14. On February 19, 2019, Defendants filed a motion for rehearing in the Texas Supreme Court.

15. On March 29, 2019, Defendants filed a supplement to motion for rehearing.

16. On May 3, 2019, the Texas Supreme Court denied Defendants motion for rehearing.

17. Plaintiffs therefore, renew and/or seek anew a motion to for attorney fees.

18. Plaintiffs are the prevailing party in the dismissal action under Texas Civil Practice and Remedies Code §27.009.

19. Plaintiffs now seek to recover attorney fees incurred in the dismissal matter due to the extraordinary circumstances and frivolous nature of the original motion and the obvious delay perpetrated in prosecuting the underlying claims. TEX. CIV. PRAC. & REM. Code §27.009(b).

20. An Affidavit executed by counsel for Plaintiffs, J. Paul Manning, is attached as Exhibit "A." It provides that Plaintiffs have incurred and paid reasonable and necessary attorneys' fees and expenses totaling $57,563.00. This includes all attorneys' fees associated with Defendants filing of the Motion to Dismiss and numerous appeals and requests for rehearings and other sundry motions incurred through the date of the Supreme Court's Judgment.

21. True and correct copies of all redacted monthly invoices showing the amount of time billed per timekeeper, a redacted description of the work conducted, and a dollar amount charged are attached to the Affidavit of J. Paul Manning.

WHEREFORE, PREMISES CONSIDERED, INTERNET MONEY LIMITED D/B/A THE OFFLINE ASSISTANT AND KEVIN O'CONNOR, INDIVIDUALLY, request that the Court grant this Motion for Attorneys' Fees and order that INTERNET MONEY LIMITED D/B/A THE OFFLINE ASSISTANT AND KEVIN O'CONNOR, INDIVIDUALLY, is entitled to attorneys' fees in the amount of $57,563.00.

Respectfully submitted,

/s/ J. Paul Manning
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ATTORNEY FOR PLAINTIFFS

<u>CERTIFICATE OF SERVICE</u>

A true and correct copy of the above and foregoing instrument was on this 12th day of June, 2019, served on the attorneys of record through TexasFiling as follows:

<u>Email: [illegible]</u>
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/s/ J. Paul Manning
J. PAUL MANNING

Case 2016-519,740

INTERNET MONEY LIMITED and KEVIN O'CONNOR, Plaintiffs, v. TIMOTHY CASTLEMAN and CASTLEMAN CONSULTING LLC, Defendants.	237th District Court Lubbock County

Order Denying O'Connor's Motion for Fees

The Court has considered Plaintiff's Motion For an Award of Attorney Fees, the opposition, the exhibits, and counsels' argument. Based on that consideration, the motion is denied.

Signed on June 28, 2019, at Lubbock, Texas.

Les Hatch
District Judge

Filed 8/16/2019 12:00 AM
Barbara Sucsy
District Clerk
Lubbock County, Texas
dm

CAUSE NO. 2016-519,740

INTERNET MONEY LIMITED d/b/a THE OFFLINE ASSIST AND KEVIN O'CONNER, INDIVIDUALLY Plaintiffs	§	IN THE 237TH DISTRICT COURT
	§	OF
	§	
vs.	§	
TIMOTHY CASTLEMAN AND	§	LUBBOCK COUNTY, TEXAS
CASTLEMAN CONSULTING, LLC	§	
Defendant.	§	

MOTION TO WITHDRAW AS ATTORNEY

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES The Law Office of Jared B. Hall, PLLC and Jared B. Hall, (Counsel) attorney for Defendant TIMOTHY CASTLEMAN AND CASTLEMAN CONSULTING, LLC, in the above entitled and numbered cause, and files this his Motion to Withdraw as Attorney and for grounds therefore states as follows:

1. Plaintiff is UNIVERSAL NORTH AMERICA INSURANCE COMPANY, who is represented by J. Paul Manning, Feild, Manning, Stone, Hawthorne & Aycock, P.C.
2. Defendant is INTERNET MONEY LIMITED, d/b/a THE OFFLINE ASSISTANT and KEVIN O'CONNOR, INDIVIDUALLY'S 3. Discovery of this suit is governed by a Level 3 agreed discovery control plan.
4. This case is not currently set for trial.
5. To date, the parties have primarily conducted written discovery.
6. By copy of this Motion, Defendant TIMOTHY CASTLEMAN AND CASTLEMAN CONSULTING, LLC has been notified of his right to object to this Motion to Withdraw by copy sent to Defendant's last known address 5741 109th St., Lubbock, TX 79424. Counsel has contacted Defendant TIMOTHY CASTLEMAN AND CASTLEMAN CONSULTING, LLC who consents to this Motion to Withdraw.

DOCC - DOCUMENT
Case No: 2016-519,740

7. There is good cause, as required by Texas Rule of Civil Procedure 10, for this court to grant the Motion to Withdraw.

Prayer

WHEREFORE, upon hearing hereof, the undersigned prays that this Court enter its order allowing withdrawal herein.

Respectfully submitted,

/s/ Jared B. Hall
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of September, 2019, a true and correct copy of this document has been served in accordance with TEX. R. CIV. P. 21 and 21a upon the following parties:

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/s/ Jared B. Hall
Jared B. Hall

CAUSE NO. 2016-519,740

INTERNET MONEY LIMITED d/b/a THE OFFLINE ASSISTANT AND KEVIN O'CONNOR, INDIVIDUALLY, Plaintiffs,	§	IN THE 237TH DISTRICT COURT
V.	§	OF
TIMOTHY CASTLEMAN AND CASTLEMAN CONSULTING, LLC, Defendants.	§	LUBBOCK COUNTY, TEXAS

ORDER SETTING HEARING

The Court having found the Plaintiffs' Motion to Compel and Request for Attorney's Fees to be in proper form, and Plaintiffs having requested a hearing on same,

IT IS, THEREFORE, ORDERED that the Plaintiffs' Motion to Compel and Request for Attorney's Fees is set for hearing on the 20th day of December, 2019, at 9:00 o'clock a.m. in the 237th District Courtroom of Lubbock County, Texas.

SIGNED this 9th day of December, 2019.

JUDGE PRESIDING

CAUSE NO. 2016-519,792

[redacted] THE OFFLINE ASSISTANT AND [redacted] INDIVIDUALLY, Plaintiffs,	§	IN THE 237th DISTRICT COURT
V.	§	OF
TIMOTHY CASTLEMAN AND CASTLEMAN CONSULTING, L.L.C., Defendants.	§	LUBBOCK COUNTY, TEXAS

ORDER GRANTING PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEY'S FEES

The Court, having considered the Plaintiffs' Motion for an Award of Attorney's Fees, together with supporting evidence and the arguments made by counsel together with legal authority submitted by counsel, the Court is of the opinion that the Motion is granted.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiffs' Motion for an Award of Attorney's Fees is and the same is hereby GRANTED in the amount of [redacted].

All costs of court are taxed against the party incurring same. All relief not expressly granted herein is hereby denied.

SIGNED this 20th day of December, 2019.

JUDGE PRESIDING

CAUSE NO. 2016-519,740

INTERNET MONEY LIMITED d/b/a THE OFFLINE ASSISTANT AND KEVIN O'CONNOR, INDIVIDUALLY, Plaintiffs,	§	IN THE 237TH DISTRICT COURT
V.	§	OF
TIMOTHY CASTLEMAN AND CASTLEMAN CONSULTING, LLC, Defendants.	§	LUBBOCK COUNTY, TEXAS

ORDER GRANTING MOTION FOR SEVERANCE

The Court, after considering the pleadings, briefings, and argument of counsel, grants the motion for severance, severs the Order Granting Plaintiff's Motion for an Award of Attorney' Fees, dated December 20, 2019, against Defendants TIMOTHY CASTLEMAN AND CASTLEMAN CONSULTING, LLC in this matter from the other claims against Defendants TIMOTHY CASTLEMAN AND CASTLEMAN CONSULTING, LLC into a new cause of action.

IT IS HEREBY ORDERED that Plaintiffs INTERNET MONEY LIMITED D/B/A THE OFFLINE ASSISTANT AND KEVIN O'CONNOR, INDIVIDUALLY's Motion for Severance is GRANTED.

This ORDER HEREBY completely severs into a separate cause of action the Order Granting Plaintiffs' Motion for an Award of Attorney' Fees, dated December 20, 2019. It is further ORDERED that the newly severed case be numbered and styled: *Cause No:* 2016-519,740-A; INTERNET MONEY LIMITED D/B/A THE OFFLINE ASSISTANT AND KEVIN O'CONNOR, INDIVIDUALLY v. TIMOTHY CASTLEMAN AND CASTLEMAN CONSULTING, LLC.

The only claim to be severed into the severed case are is Plaintiffs' Order Granting

Plaintiffs' Motion for Award of Attorney's Fees. The pleadings and documents to be included in the new severed case are Plaintiffs' Motion for Award of Attorney's Fees and any attachments such as Defendants' response to same.

IT IS FURTHER ORDERED that Plaintiff INTERNET MONEY LIMITED D/B/A THE OFFLINE ASSISTANT AND KEVIN O'CONNOR, INDIVIDUALLY shall bear the costs of severance.

SIGNED this 15th day of January, 2019.

JUDGE PRESIDING

CAUSE NO. 2020-540788

TIMOTHY CASTLEMAN and CASTLEMAN CONSULTING, LLC, Petitioners/Defendants,	§	IN THE 237TH DISTRICT COURT
v.	§	OF
INTERNET MONEY LIMITED, d/b/a THE OFFLINE ASSIST and KEVIN O'CONNOR, INDIVIDUALLY, Respondents/Plaintiffs,	§	LUBBOCK COUNTY, TEXAS

DECLARATION OF TIMOTHY CASTLEMAN

1. "My name is Timothy Castleman. I am making this declaration in both my individual capacity and in my capacity as Chief Executive Officer of Castleman Consulting, LLC. Whenever I use the word "I" or "me," I am speaking for myself. When I use the word "Petitioners," I am speaking for myself and for Castleman Consulting, LLC.

2. "I am over the age of 18, and I am authorized to make this declaration and the statements contained herein on behalf of Castleman Consulting, LLC.

3. "Based on my personal knowledge, the facts stated herein are true and correct to the best of my knowledge.

4. "Petitioners were represented by attorney Jared B. Hall in Cause No. 2016-519740 until his withdrawal as counsel was approved by this Court in that case on September 19, 2019.

5. "From September 19, 2019 until July 8, 2020, Petitioners were not represented by counsel in either Cause No. 2016-519740 or the severed out Cause No. 2016-519740-A.

6. "Petitioners had not been notified of any trial setting by their trial attorney, Mr. Hall, before he withdrew in September of 2019 or afterward, or by their appellate attorney Leif Olson before he withdrew in July of 2019 or afterward, and they were not otherwise aware of the trial setting.

7. "From the date of Mr. Hall's withdrawal until today, Petitioners did not received any notices of any filings in Cause No. 2016-519740 or the severed out Cause No. 2016-519740-A other than a letter addressed to me from J. Paul Manning, Respondents' attorney, sometime after December 20, 2019 informing me that they had filed a Motion for Severance, and a notice pursuant to Rule 306a(3) of the Final Judgment entered on March 2, 2020 in Cause No. 2016-519740.

8. "Petitioners did not receive the Order setting a hearing for December 20, 2019 on Plaintiffs' Motion to Compel in Cause No. 2016-519740 and did not otherwise have any notice of that Order or the hearing. Petitioners had no notice that any request for attorney's fees would be heard then or at any other time. Petitioners were not present nor were they represented at the December 20th hearing.

9. "As stated above, I received a letter from Respondents' attorney notifying me of the filing of the Motion for Severance in Cause No. 2016-519740 with an enclosed copy of the Motion, which was mailed on December 20th according to the Certificate of Service, but the letter did not provide notice of the December 27th hearing on the motion.

10. "Petitioners did not receive the Order setting a hearing by submission on December 27, 2019 on Plaintiffs' Motion for Severance, and did not otherwise have any notice of that Order or the hearing.

11. "Petitioners did not receive any notice, whether pursuant to Rule 306b(3) or otherwise, of the January 15, 2020 Order of Severance in Cause No. 2016-519740 and severing out that order into in Cause No. 2016-519740-A, supposedly making the December 20, 2012 Order for $57,563 in attorney's fees into a final judgment. Petitioners did not learn of either the December 20th or the January 15th Order until they were notified by their former attorney, Mr. Hall, who was still receiving electronic notices for the case, at which time Petitioners, at the suggestion of Mr. Hall,

filed a Motion for Re-hearing on January 17, 2020.

12. "Respondents filed an Application for Writ of Garnishment after Judgment against Petitioners' accounts at City Bank, in Cause No. 2020-538815, which was issued and served the Bank that same day on February 14, 2020.

13. "I am not an attorney, so, in early February, I had begun attempts to find an attorney for purposes of trying to get the garnishment lifted that was placed on my bank accounts. On February 28th I paid a retainer to a Lubbock attorney to handle the garnishment issues, right before I left the country to go to Spain on March 1st. But, this attorney terminated her representation on March 10th without ever making an appearance in the garnishment case.

14. "Petitioners were not present for and were not represented by counsel at the March 2nd trial. All Defendants were aware of as of that date was that they had filed a Motion for Rehearing on January 17th of the Court's Order of Severance, and they were waiting for a ruling from the Court on that Motion. Petitioners learned that a trial had been held that day and a final judgment entered when I was contacted that afternoon, while I was in Spain, by Petitioners' former attorney, Mr. Hall, who was still getting service of notices in the case through his email.

15. "Upon my return from Spain on March 18th, the TSA advised me to self-quarantine for 14 days, which I did. During this time, I spoke to Mr. Hall again, who told me he could not represent me or my company and that I needed to file a Motion for New Trial and immediately retain counsel. Acting *pro se*, I timely filed a Motion for New Trial on April 1st, and resumed my attempts to retain counsel who I needed to represent me and especially Castleman Consulting, LLC in Cause No. 2016-519740 and Cause No. 2016-519740-A.

16. "I used the State Bar of Texas web-site on four separate occasions attempting to find a lawyer. In all, I contacted or was contacted by 43 different attorneys located in Lubbock, Midland,

Amarillo, Fort Worth, Dallas, Houston and Austin, all of whom immediately or after discussing or review of my case declined to represent me, either because of distance or because they thought my case was too far along for them to get involved. I even contacted another attorney at Crenshaw, Dupree & Milam during this time, who was not able at the time to represent Defendants.

17. "The Covid-19 situation made it difficult for Petitioners to find an attorney. Many law offices Petitioners contacted were either closed, not taking on new clients during the crisis, or would not allow me to come into the office to discuss the case. Petitioners were not able to retain new counsel until I finally re-contacted Crenshaw, Dupree & Milam on July 2nd and spoke to another attorney, Mark McBrayer, who said he would review my files, and after a few days, on July 8th, he agreed to represent Petitioners."

Declarant says nothing further.

JURAT
PURSUANT TO TEXAS CIVIL PRACTICE AND REMEDIES CODE § 132.001

"My name is Timothy Castleman. My date of birth is November 28, 1979. I am a resident of Lubbock County Texas, and I reside at 5741 109th St., Lubbock, Texas 79424. The business address for Castleman Consulting, LLC is the same. I declare under penalty of perjury that the foregoing is true and correct."

Executed in Lubbock County, Texas, on October 9th, 2020.

By: Timothy Castleman, Declarant
Individually, and as Chief Executive Officer,
Castleman Consulting, LLC

CAUSE NO. 2016-519,740-A

INTERNET MONEY LIMITED, d/b/a THE OFFLINE ASSIST and KEVIN O'CONNOR, INDIVIDUALLY, Plaintiffs,	§	IN THE 237TH DISTRICT COURT
v.	§	OF
TIMOTHY CASTLEMAN and CASTLEMAN CONSULTING, LLC, Defendants	§	LUBBOCK COUNTY, TEXAS

DECLARATION OF JARED B. HALL

1. "My name is Jared B. Hall. I am over the age of 18. Based on my personal knowledge, the facts stated herein are true and correct to the best of my knowledge.

2. "I am an attorney licensed by the State of Texas. I represented Timothy Castleman and Castleman Consulting, LLC in Cause No. 2016-519,740, *Internet Money Limited, d/b/a The Offline Assist and Kevin O'Connor, Individually v. Timothy Castleman and Castleman Consulting, LLC*, in the 237th District Court of Lubbock County until I withdrew as counsel when I moved from Lubbock to Houston to practice law. My withdrawal as counsel was approved by the court on September 19, 2019.

3. "At the time of my withdrawal, I do not recall having informed my clients of any upcoming deadlines or settings in the case because there were no pending motions or other impending matters on the docket, and I anticipated that Timothy Castleman and Castleman Consulting, LLC would retain new counsel who would keep them updated on the case and handle all matters going forward.

4. "After my withdrawal, however, I did continue to get electronic case filings in the lawsuit, but I did not have a habit of monitoring those filings. On or about January 15, 2020, however, I did see the electronic notice of the Court's granting of the Order of Severance, at which time I called Timothy Castleman to make sure he was aware of that Order.

5. "Although I re-affirmed to Timothy at that time that I was not representing him or Castleman Consulting, LLC, I suggested that he needed to quickly find an attorney and get a motion on file requesting a re-hearing on the Order of Severance. I even suggested the name of a Lubbock law firm for him to contact.

6. "The next time I spoke with Timothy Castleman was in late March of this year, after he had just returned from a trip to Spain. He told me that he had received a notice of a final judgment entered in the case. Once again, I told him that I was not his attorney and could not represent him, and that he needed to retain counsel as soon as possible."

Declarant says nothing further.

JURAT
PURSUANT TO TEXAS CIVIL PRACTICE AND REMEDIES CODE § 132.001

My name is Jared B. Hall. My date of birth is December 2, 1976. My address is 5930 Royal Lane, Ste B #515, Dallas, TX 75230-3896, USA. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Harris County, State of Texas, on the 10th day of July, 2020.

/s/ Jared B. Hall
Jared B. Hall

Case 2016-519,740-A

INTERNET MONEY LIMITED and KEVIN O'CONNOR, Plaintiffs, v. TIMOTHY CASTLEMAN and CASTLEMAN CONSULTING LLC, Defendants.	237th District Court Lubbock County

Declaration of Leif A. Olson

1. I am licensed to practice law in Texas and work for the United States Department of Labor in Washington, D.C. Before leaving private practice to work for DOL in August 2019, I represented Timothy Castleman and Castleman Consulting LLC in Lubbock County District Court Case 2016-519,740 for purposes of their motion to dismiss under the Texas Citizens Participation Act and the associated interlocutory appeals to the Seventh Court of Appeals and the Supreme Court of Texas.

2. While I was lead counsel in the appellate proceedings, Jared Hall was lead counsel in the trial court and worked with the Castleman parties regarding trial-court matters other that the TCPA motion. I did not communicate with the Castleman parties regarding trial-court scheduling or deadlines except as they concerned the TCPA motion.

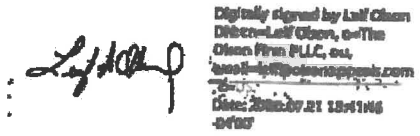
3. Because Mr. Hall was not available to do so, I appeared on the Castleman parties' behalf to respond to and argue against the plaintiffs' trial-court motion to be awarded attorneys' fees for the appeal. I appeared by telephone to argue at the hearing on that motion on June 21, 2019. That was my last involvement with the case. At that point, Mr. Hall had moved from Lubbock, and I understood that the Castleman parties would be retaining new counsel to represent them in the trial court.

4. I received no notices from the Court or from the plaintiffs' counsel after the hearing on the motion for fees. This includes notice that the motion for fees had been denied, notice that the plaintiffs had filed a motion to compel discovery responses, notice of a hearing on the motion to compel, notice that motion to compel had been granted, notice that the plaintiffs requested that the Court reconsider their motion for attorneys' fees (which I understand did not occur), notice that the Court signed an order granting the plaintiffs those attorneys' fees, notice that the fee orders had been severed from the original case into this one, and notice of the trial setting.

5. Each statement in this declaration is true, correct, and within my personal knowledge.

My name is Leif A. Olson. I was born on October 10, 1975. My address is 7433 Ridge Oak Court, Springfield, Virginia 22153. I declare under the penalty of perjury that the statements in this declaration are true and correct.

Signed in Fairfax County, Virginia, on July 21, 2020.



CAUSE NO. 2016-519,740

INTERNET MONEY LIMITED d/b/a THE OFFLINE ASSISTANT AND KEVIN O'CONNOR, INDIVIDUALLY, Plaintiffs,	§	IN THE 237TH DISTRICT COURT
V.	§	OF
TIMOTHY CASTLEMAN AND CASTLEMAN CONSULTING, LLC, Defendants.	§	LUBBOCK COUNTY, TEXAS

FINAL JUDGMENT

On March 2, 2020, this case was called for trial. Plaintiffs appeared through its attorney and announced ready for trial. Defendants nor their counsel appeared.

The Court heard evidence and arguments of counsel. The Court finds that Plaintiffs provided clear and specific evidence of each element of their claims, including the facts of when, where, and what was said, the defamatory nature of the statements, and how they damaged Plaintiffs. The Court further finds that Defendants' statements were made with either the knowledge of their falsity or, at the very least, with reckless disregard as to their truth or falsity. The Court finds that Defendants admitted their intent to harm Plaintiffs and acknowledged the damage their statements were causing Plaintiffs and hereby renders judgment for Plaintiffs, Internet Money Limited d/b/a The Offline Assistant and Kevin O'Connor, individually for their claims of libel and slander as follows:

1. The Court orders that Plaintiffs, Internet Money Limited d/b/a The Offline Assistant and Kevin O'Connor, individually recover from Defendants, Timothy Castleman and Castleman Consulting, LLC, actual damages in the following amounts: Timothy Castleman and Castleman Consulting, LLC are jointly and severally liable for the amount of $108,786.00 to Plaintiffs, Internet Money Limited d/b/a The Offline Assistant and Kevin O'Connor, individually.

2. Pursuant to Section 41.008(b) of the *Texas Civil Practice and Remedies Code*, this

Court awards a punitive damage award against Defendants, Timothy Castleman and Castleman Consulting, LLC for $100,000.00. The Court orders that Plaintiffs, Internet Money Limited d/b/a The Offline Assistant and Kevin O'Connor, individually recover from Timothy Castleman and Castleman Consulting, LLC punitive damages in the following amounts: Timothy Castleman and Castleman Consulting, LLC are jointly and severally liable for the amount of $100,000.00 in punitive damages to Plaintiffs, Internet Money Limited d/b/a The Offline Assistant and Kevin O'Connor, individually.

3. The Court awards pre-judgment interest on Plaintiffs, Internet Money Limited d/b/a The Offline Assistant and Kevin O'Connor's past damages awarded of $108,786.00 at the annual rate of 5.0% simple interest in the total sum of $21,727.40. Timothy Castleman and Castleman Consulting, LLC are jointly and severally liable for the amount of $21,727.40 in pre-judgment interest to Plaintiffs, Internet Money Limited d/b/a The Offline Assistant and Kevin O'Connor.

4. Pre-judgment interest begins to accrue on the earlier of (1) 180 days after the date a defendant receives written notice of a claim or (2) the date suit is filed. In the absence of an applicable pre-judgment interest statute, this Court will apply the prejudgment interest approach set forth in section 304.101 *et seq.* of the Texas Finance Code. Under section 304.103 of the Texas Finance Code, prejudgment interest accrues at the same rate as post-judgment interest. At the time of this judgment, post-judgment interest accrues at a rate of 5.0%.

5. Pre-judgment interest began accruing on the date the suit was filed, March 4, 2016, and stopped accruing on the day before the judgment was rendered, March 1, 2020, resulting in a total accrual of 1458 days.

6. The Court also awards attorney fees in the amount of $17,623.00 for representation through trial and the completion of proceedings in the trial court; $24,000.00 for representation

through appeal to the court of appeals; $3,000.00 for representation at the petition for review stage in the Supreme Court of Texas; $12,000.00 for representation at the merits briefing stage in the Supreme Court of Texas; and $5,000.00 for representation through oral argument and the completion of proceedings in the Supreme Court of Texas. Timothy Castleman and Castleman Consulting, LLC are jointly and severally liable for the amount of $18,000.00 for representation through trial and the completion of proceedings in the trial court to Plaintiffs, Internet Money Limited d/b/a The Offline Assistant and Kevin O'Connor and also liable to Plaintiffs, Internet Money Limited d/b/a The Offline Assistant and Kevin O'Connor for the aforementioned appellate attorney fees as they occur.

7. The Court also awards court costs in the amount of $55.00 and post-judgment interest on the total amount of the judgment at the annual rate of 5.0% compounded annually to Plaintiffs, Internet Money Limited d/b/a The Offline Assistant and Kevin O'Connor. Timothy Castleman and Castleman Consulting, LLC are jointly and severally liable for all costs.

8. The Court awards post-judgment interest on Plaintiffs, Internet Money Limited d/b/a The Offline Assistant and Kevin O'Connor's damages at the annual rate of 5.0% compounded annually.

9. This judgment finally disposes of all parties and claims in this cause of action and is appealable.

10. The Court orders execution to issue for this judgment.

Signed on March 2, 2020.

The Honorable Lee Hatch

602 S.W.3d 687
Court of Appeals of Texas, Amarillo.

MM&J INVESTMENTS LLC and Tim Moneymaker, Individually, Appellants
v.
KTH INVESTMENTS, LLC d/b/a West Texas Agency, Appellee

No. 07-18-00396-CV
|
April 8, 2020

Synopsis

Background: Investment company brought action against limited liability corporation and some of its individual owners, alleging claims for breach of contract, tortious interference with contract, tortious interference with a business relationship, and fraud. After defendants did not appear for trial, the trial court rendered default judgment in favor of investment company and awarded damages of $110,000 and attorney's fees of $25,000. Defendants filed motion for new trial. After a hearing, the County Court at Law No. 3, Lubbock County, Ann-Marie Carruth, J., overruled defendants' motion by operation of law. Defendants appealed.

[Holding:] The Court of Appeals, Parker, J., held that defendants' affidavit and testimony that they did not receive notice of trial setting overcame presumption of notice arising from stipulation that notice was sent.

Reversed and remanded.

West Headnotes (9)

[1] **Appeal and Error** Discretion of Lower Court; Abuse of Discretion

New Trial Discretion of court

A motion for new trial is addressed to the trial court's discretion and the court's ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion.

[2] **Judgment** Proceedings in General

A trial court does not abuse its discretion when it denies a motion for new trial after entry of default judgment unless the defaulting party proves that (1) his failure to appear was not intentional or the result of conscious indifference, (2) he has a meritorious defense, and (3) the granting of a new trial will not operate to cause delay or injury to the opposing party; however, if the defaulting party proves the first element by establishing that he was not given notice of a trial setting, a court may dispense with the second and third elements.

[3] **Judgment** Nature of judgment by default

The law prefers that cases be resolved on their merits wherever possible, rather than by default.

[4] **Trial** Notice of Trial

The law presumes that a trial court will hear a case only after giving proper notice to the parties.

[5] **Constitutional Law** Default

Prior to a default judgment hearing, due process requires that parties receive notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections. U.S. Const. Amend. 14.

[6] **Constitutional Law** Time of trial

Failing to give notice to a party of a trial setting violates the due process requirements of the federal constitution. U.S. Const. Amend. 14.

[7] **Judgment** Proceedings in General

Postanswer default judgment will be valid only if defendant had received notice of default judgment hearing.

[8] **New Trial** Notice and time or place of trial or hearing

Affidavit and sworn testimony of defendants that they did not receive notice of the trial setting was sufficient to establish this fact, and thus, were entitled to a new trial, even though a presumption of service had arisen from parties' stipulation that notice of the trial setting was sent to defendants' correct address by first class mail and was not returned to the court as undeliverable; a stipulation that notice was sent to defendants' correct address was not sufficient, on its own, to controvert defendants' affidavit and testimony that they did not receive the notice. Tex. R. Civ. P. 21a.

1 Cases that cite this headnote

[9] **Evidence** Rebuttal of presumptions of fact

Presumption that when notice of trial setting properly addressed and postage prepaid is mailed, notice was duly received by addressee vanishes when opposing evidence is introduced that letter was not received. Tex. R. Civ. P. 21a.

1 Cases that cite this headnote

***688 On Appeal from the County Court at Law No. 3, Lubbock County, Texas, Trial Court No. 2017-572,675, Honorable Ann-Marie Carruth, Presiding**

Attorneys and Law Firms

Robert N. Nebb, Lubbock, for Appellants.

Andrew B. Curtis, Lubbock, for Appellee.

Before QUINN, C.J., and PIRTLE[1] and PARKER, JJ.

OPINION

Judy C. Parker, Justice

MM&J Investments, LLC (MM&J), and Tim Moneymaker, appellants, appeal the trial court's overruling, by operation of law, their motion for new trial. We reverse and remand to the trial court for a new trial.

Factual and Procedural Background

In October of 2016, MM&J and KTH Investments, LLC (KTH), appellee, entered into an asset purchase agreement under which MM&J agreed to buy an insurance franchise from KTH for $110,000. When MM&J did not close on the deal on the scheduled date, KTH filed suit against MM&J and two of its owners, Moneymaker and Danny Mayfield, alleging claims for breach of contract, tortious interference with contract, tortious interference with a business relationship, and fraud. Appellants answered asserting a general denial and numerous defenses. Subsequently, appellants amended their answer to assert counterclaims and demanded a jury trial.

***689** In March of 2018, the attorney for MM&J and Moneymaker moved to withdraw from representation. The trial court granted the motion. In April of 2018, KTH and Mayfield reached a settlement agreement and filed a joint motion to dismiss KTH's claims against Mayfield. The trial court granted this dismissal motion and the case against appellants proceeded.

On June 4, 2018, the trial court signed an order setting the case for a non-jury trial on August 2, 2018. The trial court mailed a copy of the order to Moneymaker at his last known address by first class mail. Appellants did not appear for trial. KTH presented evidence to the bench. The trial court rendered default judgment against appellants and signed a final judgment providing that appellants take nothing by their counterclaims and finding in favor of KTH on its breach of contract and fraud claims. The court awarded KTH damages in the amount of $110,000, attorney's fees of $25,000, plus pre-judgment and post-judgment interest.

Appellants received notice of the default judgment on August 22, 2018, when Moneymaker signed for a certified mail notice of the default judgment. Within a week, appellants filed a motion for new trial. Moneymaker submitted an affidavit with the new trial motion explaining that he did not receive notice of the trial setting. The trial court held a hearing on the motion at which the parties stipulated that the trial court sent the order setting trial to Moneymaker's correct address by first class mail, and that the mailing was not returned to the court. During the hearing, Moneymaker testified under oath that

he did not receive the order setting hearing. Moneymaker also testified that mail was often misdelivered at the multiple story office building in which he maintained his office. At the end of the hearing, the trial court took the matter under advisement. However, when the trial court did not timely rule on appellants' motion, it was overruled by operation of law. From this ruling, appellants appealed.

Appellants present two issues by their appeal. By their first issue, appellants contend that the trial court abused its discretion in denying their motion for new trial. Appellants' second issue contends that there was no evidence to support the trial court's judgment in favor of KTH. We will only review appellants' first issue because we find it to be dispositive.

Standard of Review

[1] **[2]** "A motion for new trial is addressed to the trial court's discretion and the court's ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion." *Cliff v. Huggins*, 724 S.W.2d 778, 778-79 (Tex. 1987). A trial court does not abuse its discretion when it denies a motion for new trial after entry of default judgment unless the defaulting party proves the elements identified in *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (1939). *See Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 926 (Tex. 2009) (per curiam). Under *Craddock*, the party against whom default was entered must show that (1) his failure to appear was not intentional or the result of conscious indifference, (2) he has a meritorious defense, and (3) the granting of a new trial will not operate to cause delay or injury to the opposing party. *Cliff*, 724 S.W.2d at 779. If the party proves the first element under *Craddock* by establishing that he was not given notice of a trial setting, a court may dispense with the second and third elements. *Mathis v. Lockwood*, 166 S.W.3d 743, 744 (Tex. 2005).[2]

***690** **[3]** **[4]** **[5]** **[6]** **[7]** The law prefers for cases to be resolved on their merits wherever possible, rather than by default. *Ashworth v. Brzoska*, 274 S.W.3d 324, 329 (Tex. App.—Houston [14th Dist.] 2008, no pet.). We presume a trial court will only hear a case after proper notice has been given to the parties. *Id.* That all parties receive notice that is reasonably calculated, under the circumstances, to apprise them of the pendency of the action and to afford them the opportunity to present their objections is a requirement of due process. *Cruz v. Sanchez*, 528 S.W.3d 104, 109 (Tex. App.—El Paso 2017, pet. denied) (citing *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 84, 108 S. Ct. 896, 99 L. Ed. 2d 75 (1988)). Failing to give notice to a party of a trial setting violates the due process requirements of the United States Constitution. *Mabon Ltd. v. Afri-Carib Enters., Inc.*, 369 S.W.3d 809, 813 (Tex. 2012) (per curiam). In fact, "[a] post-answer default judgment will only be valid if the defendant received notice of the default judgment hearing." *$429.30 v. State*, 896 S.W.2d 363, 366 (Tex. App.—Houston [1st Dist.] 1995, no writ). As such, a lack of notice of a trial setting is a ground for reversal of a default judgment. *Custom-Crete, Inc. v. K-Bar Servs.*, 82 S.W.3d 655, 660 (Tex. App.—San Antonio 2002, no pet.) (citing *LBL Oil Co. v. Int'l Power Servs., Inc.*, 777 S.W.2d 390, 390-91 (Tex. 1989) (per curiam)).

Analysis

[8] The question before this Court is whether appellants, through Moneymaker, proved that they did not receive notice of the trial setting. Moneymaker filed an affidavit attesting that he did not receive the notice of trial setting and he reiterated this lack of notice through his sworn testimony at the hearing on the motion for new trial. KTH argued that the stipulation entered into by the parties, which established that the notice of trial setting was sent to Moneymaker's correct address by first class mail and was not returned to the court as undeliverable, was sufficient to give rise to the presumption of service under Rule 21a of the Texas Rules of Civil Procedure.

[9] Under Rule 21a, all notices other than citation—including notice of trial setting—may be served in person, by mail, by commercial delivery service, by fax, by email, or by another manner approved by the trial court. Tex. R. Civ. P. 21a(a)(2). Service by mail is complete upon deposit of the document, postpaid and properly addressed, in the mail. Tex. R. Civ. P. 21a(b)(1). If notice is properly served in this manner, Rule 21a creates a presumption that the notice was received by the addressee. *Cliff*, 724 S.W.2d at 780. We acknowledge that the stipulation in this case is sufficient to give rise to the presumption that Moneymaker was served with the notice of trial setting. However, this presumption vanishes when evidence is introduced that the notice was not actually received. *Wembley Inv. Co. v. Herrera*, 11 S.W.3d 924, 927 (Tex. 1999); *Cliff*, 724 S.W.2d at 780; *Ashworth*, 274 S.W.3d at 331 (citing *Mathis*, 166 S.W.3d at 744-45). Consequently, the stipulation establishes that the notice of trial setting was properly mailed to Moneymaker, but this evidence does not controvert Moneymaker's affidavit and testimony that he did

not ***691** receive the notice.[3] *See Mathis*, 166 S.W.3d at 745 ("Without this presumption, there was no evidence that Mathis received notice of the trial setting. Testimony by Lockwood's counsel that notice was *sent* did not contradict Mathis's testimony that notice was never *received*."). Even if the trial judge disbelieved Moneymaker's testimony, that would not provide affirmative evidence that service occurred. *Id.* (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984) ("When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.")).

Conclusion

Because Moneymaker's affidavit and testimony that he did not receive the notice is uncontroverted, we conclude that the evidence establishes that appellants did not receive notice of the trial setting and, as such, the trial court abused its discretion by denying appellants' motion for new trial. Accordingly, we reverse the trial court's default judgment and remand this proceeding for a new trial. *See* Tex. R. App. P. 43.2(d).

All Citations

602 S.W.3d 687

Footnotes

1 Justice Patrick A. Pirtle, not participating.

2 We acknowledge that in *Mathis*, the Supreme Court did not need to address whether the third element of the *Craddock* test applied because it found that the record did not establish that the granting of a new trial would injure the plaintiff. *Id.* But, as cited in *Mathis*, this Court has concluded that the third *Craddock* element does not apply when the defendant does not receive notice of the trial setting resulting in the default judgment. *In re Marriage of Runberg*, 159 S.W.3d 194, 200 (Tex. App.—Amarillo 2005, no pet.); *accord In re Marriage of Parker*, 20 S.W.3d 812, 817-18 (Tex. App.—Texarkana 2000, no pet.).

3 The Texas Supreme Court has identified forms of proof of service, which include a certificate of service, a return receipt from certified or registered mail, and an affidavit certifying service. *See Mathis*, 166 S.W.3d at 745. None of these forms of proof are present in this case.

398 S.W.3d 341
Court of Appeals of Texas,
Dallas.

TACTICAL AIR DEFENSE SERVICES, INC. and Gary Fears, Appellants
v.
Charles C. SEAROCK, Appellee.

No. 05–11–00201–CV.
|
Feb. 19, 2013.

Synopsis
Background: Employee brought action against non-employers, alleging breach of employment contract, fraud, conspiracy, and other causes of action arising out of his employment with another company. The 397th Judicial District Court, Grayson County, Brian Gary, J., rendered post-answer default judgment against defendants. Defendants moved for new trial arguing they did not receive notice of trial setting and met requirements for setting aside default judgment. Trial court denied motion. Defendants appealed.

Holdings: The Court of Appeals, Moseley, J., held that:

[1] because motion to withdraw as counsel and certificate of service showed that document was not properly sent in compliance with rule governing service, no presumption of receipt arose from mere existence of certificate of service, and

[2] notice of trial setting could not be imputed to defendants based on their attorney's receipt of notice of trial setting.

Reversed and remanded in part and affirmed in part.

West Headnotes (16)

[1] **Appeal and Error** Relief from default judgment

Court of Appeals reviews trial court's denial of motion for new trial following a post-answer default for abuse of discretion.

1 Cases that cite this headnote

[2] **Judgment** Necessity for excuse
Judgment Necessity for showing meritorious cause of action or defense
Judgment Prejudice from judgment

Default judgment should be set aside and a new trial granted if (1) failure to answer or appear was not intentional or the result of conscious indifference but was due to mistake or accident, (2) defendant sets up a meritorious defense, and (3) motion is filed at such time that granting new trial would not result in delay or otherwise injure plaintiff.

1 Cases that cite this headnote

[3] **Constitutional Law** Time of trial
Trial Notice of setting cause for trial

A defendant who has made an appearance in a case is entitled to notice of trial setting as a matter of due process. U.S.C.A. Const.Amend. 14.

[4] **Trial** Notice of setting cause for trial

Notice of trial setting properly sent raises a presumption that notice was received. Vernon's Ann.Texas Rules Civ.Proc., Rule 21a.

[5] **Trial** Notice of setting cause for trial

When presumption that notice of trial setting has been received is challenged, it must be proved according to rule governing service. Vernon's Ann.Texas Rules Civ.Proc., Rule 21a.

[6] **Trial** Notice of setting cause for trial

Sender of notice of trial setting may rejoin claim that notice was not received by presenting other evidence of delivery, but if sender relies on office routine to support an inference of receipt, there must be corroborating evidence. Vernon's Ann.Texas Rules Civ.Proc., Rule 21a.

[7] **Attorneys and Legal Services** Permission of court; proceedings

Because motion to withdraw as counsel and certificate of service showed that document was not properly sent in compliance with rule governing service, no presumption of receipt arose from mere existence of certificate of service. Vernon's Ann.Texas Rules Civ.Proc., Rule 21a.

[8] **Trial** Notice of setting cause for trial

Presumption of service of notice of trial setting did not arise by virtue of fact that trial court heard case, given that defendants' motion for new trial, supported by affidavits, contested receipt of notice of trial setting. Vernon's Ann.Texas Rules Civ.Proc., Rule 21a.

[9] **Trial** Notice of setting cause for trial

Notice of trial setting could not be imputed to defendants based on their attorney's receipt of notice of trial setting, where attorney informed trial court at status conference that he would be moving to withdraw, and attorney failed to give defendants required notice of withdrawal by both certified and regular first-class mail, and record did not indicate that attorney took steps to ensure so far as possible that defendants were notified of his withdrawal and of upcoming trial setting. Vernon's Ann.Texas Rules Civ.Proc., Rule 10.

1 Cases that cite this headnote

[10] **Attorneys and Legal Services** Operation and Effect of Termination

Attorneys and Legal Services Client as Bound by Acts and Omissions of Attorney

Attorney-client relationship is one of principal and agent; however, where agent abandons his office before conclusion of proceedings, any knowledge possessed by agent cannot be imputed to principal.

3 Cases that cite this headnote

[11] **Notice** Requisites and sufficiency of formal notice in general

When a statute or court rule provides method by which notice shall be given in a particular instance, notice provision must be followed with reasonable strictness.

2 Cases that cite this headnote

[12] **Constitutional Law** Time of trial

Trial Notice of setting cause for trial

Adequate notice of trial setting is not a mere formality; failure to give adequate notice violates the most rudimentary demands of due process of law. U.S.C.A. Const.Amend. 14.

[13] **Trial** Notice of setting cause for trial

Evidence that notice of trial setting was sent did not controvert evidence that notice was not received.

1 Cases that cite this headnote

[14] **Trial** Notice of setting cause for trial

Sender of notice of trial setting may challenge evidence of non-receipt, but if sender relies on office routine to support an inference of receipt, there must be corroborating evidence.

[15] **Affidavits** Use in evidence

A trial court generally may not resolve disputed fact issues regarding intent or conscious indifference on affidavits alone.

1 Cases that cite this headnote

[16] **Trial** Notice of setting cause for trial

Even if defendant's affidavits were controverted about whether they received notice of trial setting, no evidentiary hearing was requested and trial court abused its discretion by resolving factual disputes on affidavits alone.

Attorneys and Law Firms

***342** Alan Kramer Taggart, J. Gregory Whitten, McKinney, TX, for Appellants.

Robert W. Buchholz, Dallas, TX, for Appellee.

Before Justices MOSELEY, FITZGERALD, and RICHTER.[1]

OPINION

Opinion By Justice MOSELEY.

This is an appeal from the denial of a motion for new trial following a post-answer default judgment. Charles Searock sued several defendants, including Tactical Air Defense Services, Inc. and Gary Fears, ***343** for breach of his employment contract, fraud, conspiracy, and other causes of action arising out of his employment with another company. Tactical and Fears filed an answer, but after their attorney withdrew as their counsel, they failed to appear at trial. The trial court rendered a post-answer default judgment against them. Tactical and Fears moved for a new trial asserting they did not receive notice of the trial setting. The trial court denied the motion.

We conclude appellants' affidavits show they did not receive notice of the trial setting and that the trial court abused its discretion by denying the motion for new trial. We reverse the trial court's judgment against Tactical and Fears and remand Searock's causes of action against those parties for further proceedings. In all other respects, we affirm the trial court's judgment.

Background

Searock filed this lawsuit in 2007. Tactical and Fears answered and participated in discovery in the case. They filed a no-evidence motion for summary judgment in 2008, which was denied by the trial court. In 2009, Searock's attorney withdrew as his counsel. Searock, representing himself, requested a trial setting and the trial court scheduled a status conference for December 2, 2009. According to the docket sheet, Gary Corley, the attorney representing Tactical and Fears, informed the trial court at the status conference that he would be filing a motion to withdraw. The docket sheet indicates the case was set for a jury trial on October 25, 2010, at the status conference.

Corley filed his motion to withdraw from representing Tactical and Fears on December 7, 2009. The ground stated in the motion was that Corley was unable to effectively communicate with his clients. The motion states that the case was set for trial on October 25, 2010, and that a copy of the motion "has been delivered to Defendants at the following addresses," listing Tactical through its registered agent at an address in Delaware and Fears at an e-mail address. The motion contains a notice to the defendants of their right to object to the motion. The certificate of service on the motion, signed by Corley, states: "The undersigned hereby certifies that a true and correct copy of the foregoing Motion to Withdraw was served on the following this the 1st day of December, 2009 in the manner described." Below this statement, Tactical is listed with the address of the registered agent in Delaware and Fears is listed with his e-mail address.

Tactical and Fears did not file a response to the motion to withdraw and did not appear at the hearing on the motion. The trial court signed an order granting the motion to withdraw on January 12, 2010. The order stated the trial setting on October 25, 2010, and ordered that all notices in the case be served on Tactical and Fears at the addresses shown in the motion to withdraw. There is no certificate of service on the order.

When Tactical and Fears failed to appear at trial on October 25, 2010, the trial court heard evidence and rendered a post-answer default judgment against them. Within thirty days of the judgment. Tactical and Fears filed a motion for new trial supported by their affidavits arguing they did not receive notice of the trial setting and they met the requirements for setting aside a default judgment on a motion for new trial.[2] Searock filed a response to the motion for new trial raising several objections to the affidavits. Searock also filed ***344** an affidavit from Corley who stated he sent a copy of the order granting the motion to withdraw to Tactical by first-class mail to its registered agent and to Fears at his e-mail address. Corley's affidavit, however, stated the case had been set for trial on August 25, 2010 (not October 25, 2010) and this was the date included in the order he sent to his former clients. (The copy of the order attached to the affidavit contained the correct trial setting.)

The trial court heard arguments from counsel on the motion for new trial, but no evidence was offered at the hearing. The

trial court then denied the motion for new trial in a written order, sustained most of Searock's objections to Tactical's and Fears's affidavits, and found Fears was not credible based in part on his conduct in different lawsuit before the trial court. Tactical and Fears filed a notice of appeal from the final judgment and the denial of their motion for new trial.[3]

Standard of Review

[1] **[2]** We review a trial court's denial of a motion for new trial following a post-answer default for abuse of discretion. *In re R.R.,* 209 S.W.3d 112, 114–15 (Tex.2006); *Dir. State Emps. Workers' Comp. Div. v. Evans,* 889 S.W.2d 266, 268 (Tex.1994). A default judgment should be set aside and a new trial granted if (1) the failure to answer or appear was not intentional or the result of conscious indifference but was due to a mistake or accident, (2) the defendant sets up a meritorious defense, and (3) the motion is filed at such time that granting a new trial would not result in delay or otherwise injure the plaintiff. *See Cliff v. Huggins,* 724 S.W.2d 778, 779 (Tex.1987) (citing *Craddock v. Sunshine Bus Lines,* 134 Tex. 388, 133 S.W.2d 124, 126 (1939)).

"The defendant's burden as to the first *Craddock* element has been satisfied when the factual assertions, if true, negate intentional or consciously indifferent conduct by the defendant and the factual assertions are not controverted by the plaintiff.... In determining if the defendant's factual assertions are controverted, the court looks to all the evidence in the record." *In re R.R.,* 209 S.W.3d at 115 (citing *See Fid. & Guar. Ins. Co. v. Drewery Constr. Co., Inc.,* 186 S.W.3d 571, 576 (Tex.2006); *Evans,* 889 S.W.2d at 269).

[3] When the first element is established by proof that the defendant was not given notice of a trial setting, "we have dispensed with the second element for constitutional reasons." *Mathis v. Lockwood,* 166 S.W.3d 743, 744 (Tex.2005) (per curiam); *Mosser v. Plano Three Venture,* 893 S.W.2d 8, 12–13 (Tex.App.-Dallas 1994, no writ) (concluding second and third *Craddock* elements do not apply if defendant did not receive notice of setting).[4] A defendant who has made an appearance in ***345** a case is entitled to notice of the trial setting as a matter of due process. *See Peralta v. Heights Med. Ctr., Inc.,* 485 U.S. 80, 84–85, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988); *Lopez v. Lopez,* 757 S.W.2d 721, 723 (Tex.1988).

Analysis

Appellants' motion for new trial and their affidavits assert they did not receive notice of the trial setting. Searock makes three arguments for how the trial court could have found appellants had notice of the trial setting: (1) a presumption of service under rule 21a based on the certificate of service in Corley's motion to withdraw; (2) imputed notice because Corley was still counsel for appellants when the case was set for trial at the status conference; and (3) appellants' affidavits were controverted by affidavits filed by Searock and the trial court correctly resolved the conflicts as the finder of fact.

A. Presumption of Service

[4] **[5]** **[6]** Searock relies on the presumption of service under rule 21 a and a general presumption that a trial court only hears a case after proper notice to the parties. Searock contends that appellants are presumed to have received notice under rule 21a because the motion to withdraw contained a certificate of service.[5] *See* Tex.R. Civ. P. 21a. It is true that "*notice properly sent* pursuant to Rule 21a raises a presumption that notice was received." *Mathis,* 166 S.W.3d at 745 (emphasis added). But this presumption vanishes if the opposing party offers proof of non-receipt. *See Strobel v. Marlow,* 341 S.W.3d 470, 476 (Tex.App.-Dallas 2011, no pet.) (citing *Cliff,* 724 S.W.2d at 780). "[W]hen that presumption is challenged, it must be proved according to the rule." *Id.* (citing *Mathis,* 166 S.W.3d at 745). The sender may rejoin by presenting other evidence of delivery, but if the sender relies on office routine to support an inference of receipt, there must be corroborating evidence. *Id.*

[7] Here, the face of the motion to withdraw and its certificate of service indicates the motion was not served by any of the authorized methods listed in rule 21a. Regular mail and e-mail are not authorized means of service under the rule. *See* Tex.R. Civ. P. 21a. Because the motion to withdraw and the certificate of service show that the document was not "properly sent" in compliance with rule 21a, no presumption of receipt arises from the mere existence of a certificate. *See id.*[6] Accordingly, the burden fell to Searock to prove service of the motion, including that it was received by appellants. *See Strobel,* 341 S.W.3d at 476 (receipt is an element of service); *Payton v. Ashton,* 29 S.W.3d 896, 898 (Tex.App.-Amarillo 2000, no pet.) ("implicit in the concept of service is the need for the party upon whom an item is served to actually receive it").

[8] In addition, Searock relies on a general presumption of notice of the trial setting when a judgment is rendered. In the lower court opinion in *Mathis v. Lockwood,* this Court stated, "The law presumes ***346** that a trial court hears a case only after proper notice to the parties." *Mathis v. Lockwood,* 132 S.W.3d 629, 631–32 (Tex.App.-Dallas 2004), *rev'd,* 166 S.W.3d 743 (Tex.2005). The supreme court disagreed and concluded this Court erred by indulging such a presumption. *Mathis,* 166 S.W.3d at 744–45 ("We disagree that there were any such presumptions on the facts presented here.... [T]he court of appeals was incorrect in indulging a presumption that Mathis received the notice Lockwood's counsel sent."). We follow the supreme court's ruling and conclude that no such presumption arose under these facts. Clearly, the motion for new trial supported by affidavits contested receipt of notice of the trial setting. Under these circumstances, any presumption was rebutted.[7] *Id.*

B. Imputed Notice Through Counsel

[9] Searock argues that notice was imputed to appellants when Corley, their attorney at the time, received notice of the trial setting. The record indicates that Corley informed the trial court at the status conference that he would be moving to withdraw. The case was set for trial at the same conference.

[10] The attorney-client relationship is one of principal and agent. *See Gavenda v. Strata Energy, Inc.,* 705 S.W.2d 690, 693 (Tex.1986). However, "[w]here the agent abandons his office before conclusion of the proceedings, any knowledge possessed by the agent cannot be imputed to the principal." *Langdale v. Villamil,* 813 S.W.2d 187, 189 (Tex.App.-Houston [14th Dist.] 1991, no writ). *See Lynch v. McKee,* 214 S.W. 484, 485 (Tex.Civ.App.-Dallas 1919, writ dism'd w.o.j.) ("In such cases, that is, where the agent abandons his agency before concluding the matter undertaken and it is consummated through the agency of another, his knowledge, as we understand the rule, is not to be imputed to the principal.").

In seeking to withdraw from representing his clients, Corley did not comply with the requirements of rule 10. *See* Tex.R. Civ. P. 10. Rule 10 requires a motion to withdraw as counsel to state, among other things, whether the client consents to the motion and to state the client's last known address. *Id.* That rule also requires an attorney seeking to withdraw from representing his clients to give them notice either in person or by mail at their last known address by *both* certified and regular first-class mail. *Id.* Corley's motion to withdraw does not state whether the clients consented to his withdrawal. It does not indicate that the addresses listed are the last known addresses for appellants, and for Fears the only address listed is an e-mail address, not a physical address. Nor does the motion indicate it was delivered in person or by both certified and regular first-class mail.

[11] **[12]** These failings are significant in the context of determining whether notice should be imputed to Corley's former clients. When a statute or court rule provides ***347** the method by which notice shall be given in a particular instance, the notice provision must be followed with reasonable strictness. *John v. State,* 826 S.W.2d 138, 141 n. 4 (Tex.1992); *Misium v. Misium,* 902 S.W.2d 195, 197 (Tex.App.-Eastland 1995, writ denied). "The rules governing withdrawal contain provisions which are obviously placed there to protect the client's interest." *Moss v. Malone,* 880 S.W.2d 45, 50 (Tex.App.-Tyler 1994, writ denied) (op. on reh'g). Adequate notice is not a mere formality; "The failure to give adequate notice violates the most rudimentary demands of due process of law." *Mosser,* 893 S.W.2d at 12 (citing *Peralta,* 485 U.S. at 84, 108 S.Ct. 896). By failing to comply with the requirements of rule 10 and its provisions designed to ensure clients are notified when their attorney withdraws, Corley deprived appellants of valuable due process rights. The record does not indicate Corley took steps to ensure so far as possible that the clients were notified of his withdrawal and of the upcoming trial setting. That he had some unexplained difficulty communicating with his clients does not excuse his failure to comply with the straightforward requirements of rule 10.

While Corley was permitted to withdraw several months before trial, that is of no moment if his former clients never received actual notice of that fact. And to the extent Searock argues appellants had an independent duty to investigate whether their attorney was handling the case, the supreme court's observation in *Mathis* is pertinent. The court stated:

> the court of appeals held that litigants have a duty "to keep the court and parties apprised of their correct and current address." ... But even assuming there is such a duty, unless noncompliance was intentional rather than a mistake, due process requires some lesser sanction than trial without notice or an opportunity to be heard.

Mathis, 166 S.W.3d at 746. Assuming appellants had a duty to investigate whether Corley continued to represent their interests and breached that duty, due process requires a lesser sanction than trial without notice or an opportunity to be

heard. Under the circumstances of this case and considering the importance of preserving the client's right to due process when an attorney withdraws, we conclude that Corley's knowledge of the trial setting cannot be imputed to his clients.[8] *See Id.; Lynch,* 214 S.W. at 485 (agent's knowledge is not imputed to principal where agent abandons his agency); *Moss,* 880 S.W.2d at 50.

C. Affidavits and Evidentiary Hearing

Searock's last argument is that the affidavits he filed in response to the motion for new trial controverted appellants' affidavits and the trial court had the discretion to resolve the conflicts in the affidavits.

Tactical filed the affidavit of its director, Michael Cariello, in support of its motion for new trial. Cariello stated that Tactical did not receive notice of the trial setting either from Corley or from its former registered ***348** agent. Cariello stated, "[Tactical] did not receive the Order of the Court in this case granting the motion of attorney Gary Corley to withdraw, and which also set the case for trial. [Tactical] did not receive the trial setting order/notice either from attorney Gary Corley, from a registered agent, or otherwise." Cariello also stated, "If [Tactical] had received such Order or otherwise received such notice, [Tactical] would have appeared at trial to contest the allegations of Plaintiff Searock in this case."

Fears stated in his affidavit that he did not receive a copy of the order granting the withdrawal until after the default judgment and that he did not receive an e-mail from Corley containing the order of withdrawal. He stated, "The case had been set for trial on October 25, 2010, this setting was without my knowledge, further after the matter was set I never received any actual or legal notice of the trial date."[9]

[13] In response to the motion for new trial, Searock filed the affidavits of Corley and an attorney who represented other defendants in the trial court. Corley's affidavit does not dispute Tactical's affidavit evidence that it did not receive notice. Corley merely explained that he sent the order by-mail to Tactical's registered agent. Evidence that notice was sent does not controvert evidence that notice was not received. *Mathis,* 166 S.W.3d at 745 ("Testimony by Lockwood's counsel that notice was *sent* did not contradict Mathis's testimony that notice was never *received* "). Thus, Searock did not controvert Tactical's evidence of lack of notice.

[14] Searock argues Corley's affidavit controverted Fears's affidavit as to whether Fears received the e-mail attaching the order granting the motion to withdraw.[10] Corley stated in his affidavit that, "All of these e-mail addresses where I sent the Order containing the trial setting were received by all of the recipients, as shown by my own e-mail system." Corley does not state the factual basis for this conclusion other than the vague reference to his e-mail system. He does not provide any facts about how that system reported the e-mail had been received by the recipients as opposed to merely being sent from his system. The sender may challenge evidence of non-receipt, "but if the sender relies on office routine to support an inference of receipt, there must be corroborating evidence." *Strobel,* 341 S.W.3d at 476. Corley presented no evidence to corroborate the statement that the e-mail was received, such as documentation analogous to a courier receipt, fax transmittal report, or certified mail return receipt.

[15] However, assuming Corley's conclusory statement was sufficient to controvert Fears's statement of non-receipt, the conflict could not be resolved without an evidentiary hearing. A trial court generally may not resolve disputed fact issues regarding intent or conscious indifference ***349** on affidavits alone. *Estate of Pollack v. McMurrey,* 858 S.W.2d 388, 392 (Tex.1993) ("contested issues are ordinarily decided after a hearing at which witnesses present sworn testimony in person or by deposition rather than by affidavit"). The supreme court cited one of our opinions in support of its ruling. *Id.* (citing *Healy v. Wick Bldg. Sys., Inc.,* 560 S.W.2d 713, 721 (Tex.Civ.App.-Dallas 1977, writ ref'd n.r.e.) (op. on reh'g)). In *Healy,* we held:

> "We hold, therefore, under these circumstances, that a court cannot make findings of fact solely from the record on file without hearing evidence and findings so made are without effect. We also hold that in such a situation, the court is bound to accept as true the affidavits of the movant unless his opponent requests an evidentiary hearing."

Healy, 560 S.W.2d at 721; *see also Averitt v. Bruton Paint & Floor Co.,* 773 S.W.2d 574, 576 (Tex.App.-Dallas 1989, no writ) ("On a motion for new trial, the trial court is bound to accept as true the affidavits of the movant, unless the opponent requests an evidentiary hearing.").

In *Averitt,* notice of the hearing was sent by certified mail to the defendant's address, but his verified motion for new trial stated the notice was received by his father and not given to him until after the default judgment. *Averitt,* 773 S.W.2d at 576. The plaintiff did not request an evidentiary hearing

on the motion or otherwise attempt to controvert the sworn denial of receipt of notice. *Id.* at 575. Therefore, the trial court abused its discretion by denying the motion for new trial. *Id.; see also Dallas Heating Co. v. Pardee,* 561 S.W.2d 16, 20 (Tex.Civ.App.-Dallas 1977, writ ref'd n.r.e.). Although these cases dealt with the intent or conscious indifference element of the *Craddock* standard, we think they apply equally to proof of whether the defendant received notice of the trial setting.

[16] Here, Searock offered no evidence at the hearing to controvert that Tactical did not receive notice of the trial setting. Nor did Searock offer evidence beyond the conclusory statement in Corley's affidavit to show that Fears received notice by e-mail. Thus, this case is similar to *Healy* where we said:

> A court is, however, justified in determining disputed questions of fact with respect to the "conscious indifference" standard. *However, we know of no authority for a trial court to resolve disputed fact issues without hearing evidence.* Even though facts contained in the Healys' affidavits were disputed by Wick's affidavit as to whether the Healys showed a lack of conscious indifference to the suit, no evidentiary hearing on these disputed issues was requested nor had.

Healy, 560 S.W.2d at 721 (emphasis added). Thus, even if Tactical's and Fears's affidavits were controverted about whether they received notice, no evidentiary hearing was requested and the trial court abused its discretion by resolving factual disputes on affidavits alone. *See Pollack,* 858 S.W.2d at 392; *Averitt,* 773 S.W.2d at 576; *Healy,* 560 S.W.2d at 721.[11]

***350** The trial court's findings in its order denying the motion for new trial make clear that it did not credit Fears's affidavit and credited Corley's affidavit. However, disbelieving evidence is not the same as proof of the contrary: "Even if the trial judge disbelieved Mathis's testimony, that would not provide affirmative evidence that service occurred." *Mathis,* 166 S.W.3d at 745 (citing *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 512, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) ("When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.")). And if the trial court could resolve the conflicting affidavits and accept Corley's affidavit over appellants' affidavits, it would be an abuse of discretion to find that Corley gave them notice of the October 25, 2010 trial setting when his affidavit states the trial setting was August 25, 2010.

Conclusion

The appellants' motion for new trial and affidavits assert facts indicating they did not receive notice of the trial setting. Searock attempted to controvert some of those facts, but failed to request an evidentiary hearing to resolve the conflicting affidavits. We conclude the trial court abused its discretion by denying the motion for new trial. Accordingly, we sustain appellants' first issue.[12]

We reverse the trial court's judgment against Tactical and Fears and remand that portion of the case for further proceedings. In all other respects, we affirm the trial court's judgment.

All Citations

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Footnotes

1 The Honorable Martin E. Richter, Retired Justice, sitting by assignment.

2 The motion also attacked the sufficiency of the evidence to support the default judgment.

3 The notice of appeal was also filed on behalf of Jamie Goldstein. However, Goldstein later filed a motion to dismiss his appeal. By separate order, we grant the motion to dismiss.

4 The supreme court has not decided whether the third element must be dispensed with in these types of cases: however, appellants' motion asserted that a new trial would not injure Searock and nothing in the record establishes the contrary. *See Mathis,* 166 S.W.3d at 744; *see also Dolgencorp of Tex., Inc. v. Lerma,* 288 S.W.3d 922, 929 (Tex.2009) (per curiam) (third element of *Craddock* test protects a plaintiff against undue delay or injury that would result in disadvantage when presenting the merits of the case at a new trial, "such as a loss of witnesses or other valuable evidence." quoting *Evans,* 889 S.W.2d at 270); *Cliff,* 724 S. W.2d at 779–80 (requiring new trial as "there is nothing in the record to show that a new trial will work an injury to [the plaintiff]").

5 The motion to withdraw is the only document relied on as a basis for notice that contains a certificate of service.

6 Searock contends that appellants' affidavits did not address whether they received the motion to withdraw. But appellants denied receiving any notice of the trial setting. Therefore, it is immaterial whether appellants' affidavits specifically mentioned the motion to withdraw. Because no presumption of receipt arose from rule 21a, the burden fell on Searock to prove receipt of notice of the trial setting. Nothing in the record indicates that appellants received the motion to withdraw.

7 Similarly, in this direct attack on the default judgment, any presumption of notice arising from a recital of notice in the judgment was rebutted. *See P. Bosco & Sons Contracting Corp. v. Conley, Lott, Nichols Machinery Co.,* 629 S.W.2d 142, 143 (Tex.App.-Dallas 1982, writ ref'd n.r.e.) (presumption of notice arising from recital in default judgment was rebutted by evidence defendant's counsel did not receive postcard notice of the trial setting; burden shifted to plaintiff to show defendant had actual notice of the trial setting); *Lease Fin. Group, L.L.C. v. Childers,* 310 S.W.3d 120, 125 (Tex.App.-Fort Worth 2010, no pet.); *Osborn v. Osborn,* 961 S.W.2d 408, 411 (Tex.App.-Houston [1st Dist.] 1997, pet. denied) ("A recitation of due notice of the trial setting in the judgment constitutes some, but not conclusive, evidence that proper notice was given.").

8 In an unpublished opinion in a restricted appeal, we said that notice of a trial setting received by an attorney before she moved to withdraw was imputed to her client. *See Russell v. Russell,* 05–09–01674–CV, 1996 WL 732407, at *2 (Tex.App.-Dallas Nov.26, 1996, no writ) (not designated for publication). *Russell* is distinguishable because in a restricted appeal, error must be found on the face of the record. *See* Tex.R.App. P. 30. *See also Drewery,* 186 S.W.3d at 573 (explaining that cases concerning restricted appeals do not apply to appeals from motions for new trial because of differences in procedures between those types of cases). Furthermore, *Russell* is an unpublished opinion issued prior to 2003 and has no precedential value. *See* Tex.R.App. P. 47.7(b).

9 Searock did not object to the portions of the affidavits quoted in the text. The trial court granted several of Searock's objections to other portions of Cariello's and Fears's affidavits. For example, the trial court sustained objections that Fears's statements he intended to defend this lawsuit and he "had no knowledge of the trial date" were conclusory, lacked foundation, and hearsay. We express no opinion on the merit of these objections or the trial court's ruling because the unobjected-to portions of the affidavits are sufficient to deny receipt of notice.

10 The affidavit of the attorney for the other defendants attached a copy of an e-mail he received from Corley containing the order granting the motion to withdraw. This evidence does not controvert Fears's affidavit stating he did not receive the e-mail and order. *See Mathis,* 166 S.W.3d at 745.

11 Searock relies on our opinion in *Hanners v. State Bar of Texas,* 860 S.W.2d 903 (Tex.App.-Dallas 1993. no writ) to argue that the trial court acts as a fact finder at a hearing on a motion for new trial. *See id.* at 908. However, in *Manners* there was an evidentiary hearing with conflicting testimony presented regarding notice. *Id.* at 907. Thus, the trial court did not abuse its discretion by deciding the issue. Here, although affidavits were submitted by opposing parties, Searock did not request an evidentiary hearing on the issue of notice. Thus, the trial court was not authorized to resolve disputed fact issues as to intent or conscious indifference on affidavits alone. *See Pollack,* 858 S.W.2d at 392; *Averitt,* 773 S.W.2d at 576; *Healy,* 560 S.W.2d at 721.

12 We need not address the legal sufficiency issue because it offers no greater relief than appellants would be entitled to under their first issue. *See Dolgencorp of Tex., Inc. v. Lerma,* 288 S.W.3d 922, 929 (Tex.2009) (per curiam) (concluding the appropriate remedy for legal insufficiency in a post-answer default judgment case is a remand for a new trial).

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